FILED

No. 091567 JUN 23 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

v.

ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., and ELLIOTT TURBOMACHINERY CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

PAUL T. HOFMANN
HOFMANN & ASSOCIATES
360 W. 31st Street
New York, N.Y. 10001
(212) 465-8840
Paulhofmann@hofmannlawfirm.com

Attorneys for Petitioner

230579

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

At a power generating station connected to the New York City energy grid are four barges permanently moored in a canal on the navigable waters. Atop them are 32 jet-engine-like turbines powering generators affixed eight to each barge. The generators create the electricity distributed to the grid. Petitioner was a construction worker injured during an overhaul of the turbines on one of these floating power plants. He collected Longshore and Harborworker Compensation Act ("LHWCA") benefits as a result, and also brought suit against the plant owner, in tort under section 933 of LHWCA, asserting causes of action based upon violations of several New York State Labor Laws. This petition is brought for review of the New York Court of Appeals dismissal of the case on the basis that LHWCA § 905(b) preempted the claims primarily based upon the conclusion that the power plant constituted a 'vessel in navigation.'

1. Did the Court mis-apply *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) to find that the floating power plant involved herein constituted a 'vessel in navigation' contrary to the Supreme Court's teaching that non-maritime land-based commercial enterprises situated on floating platforms generally are not?

2. Did the Court err: a) by finding petitioner's proposed state law tort claims were within the maritime jurisdiction and b) by dismissing said claims on the basis that they were preempted by section 905(b) of LHWCA?

3. Assuming the barge and power plant structure atop it together are considered a vessel in navigation, and petitioner's tort claims against the owner must be asserted under LHWCA section 905(b), did the Court err by prohibiting petitioner from asserting claims for violation of the "active operations" duty and "duty to intervene" based upon violations of New York's labor laws?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW	1
BASIS FOR JURISDICTION	1
THE STATUTES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
A. FACTUAL BACKGROUND	5
B. PROCEEDINGS BELOW	10
REASONS FOR GRANTING THE PETITION	16
I. THE GOWANUS BAY #1 WAS INCORRECTLY FOUND TO BE A VESSEL IN NAVIGATION	16
A. THE SUPREME COURT'S DEFINITION OF 'VESSEL'	17

II. NO MARITIME JURISDICTION EXISTS OVER THE INJURY OCCURRING ON THE POWER PLANT PORTION OF THE STRUCTURE, ACCORDINGLY, THE COURT BELOW ERRED IN FINDING PETITIONER'S CLAIM AGAINST THE POWER PLANT OWNER PREEMPTED 25

III. STATE LAW MAY CREATE THE *SCINDIA* 'ACTIVE OPERATIONS' DUTY AND DUTY TO INTERVENE UNDER LHWCA SECTION 905(b) 32

CONCLUSION 36

TABLE OF APPENDICES

Pages

APPENDIX A—OPINION OF THE COURT OF APPEALS DATED NOVEMBER 23, 2009 . 1a

APPENDIX B—OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED AUGUST 12, 2008 ..... 21a

APPENDIX C—MEMORANDUM DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, PART 35 DATED JANUARY 12, 2007 ..... 56a

APPENDIX D—ORDER OF THE STATE OFNEW YORK, COURT OF APPEALS DATED MARCH 25, 2010 ..... 88a

APPENDIX E— RELEVANT PORTIONS OF REFERENCED STATUTES..... 90a

TABLE OF CITED AUTHORITIES

Cases: *Page(s)*

Board of Commissioners of the Orleans Levee District v. M/V BELLE OF ORLEANS, 535 F.3d 1299 (11th Cir. 2008) 2, 17, 18

Cammon v City of New York, 95 NY2d 583 (2000) 14, 15, 28

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 26

Cope v. Vallette Dry-Dock Co., 119 U.S. 625 (1887) 17, 23

De LaRosa v. St. Charles Gaming Company, Inc., 474 F. 3d. 185 (5th Cir 2006) 2, 16, 22

England v Reinauer Transp. Co., L.P., 194 F.3d 265 (1st Cir. 1999) 5, 33, 34

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19 (1926) . 20, 24

Exec. Jet Aviation, Inc. v City of Cleveland, 409 U.S 249, 268 (1972) 13

Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922) 25-26

Howard v. S. Ill. Riverboat Casino Cruises, Inc., 364 F.3d 854 (7th Cir. 2004) 16

Howlett v. Birkdale Shipping Co.,
512 U.S. 92 (1994) 2, 5, 33

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 29

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 14, 26

Kathriner v. Unisea, Inc.,
975 F.2d 657 (9th Cir. 1992) 23

King v. President Riverboat Casino-Mississippi, 894 F. Supp. 1008 (S.D. Miss. 1995) 28

Matter of Consolidated Edison of New York, Inc. v. City of New York, 44 N.Y.2d 536 (1978) 6

May v. Transworld Drilling Co.,
786 F.2d 1261 (5th Cir. 1986) 27

McLaurin v. Noble Drilling (US) Inc.,
529 F.3d 285 (5th Cir. 2008) ..... *passim*

Palanquet v. Weeks Marine, Inc.,
333 F. Supp. 2d 58 (E.D.N.Y. 2004) 29

Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 570 (5th Cir. 1995) ... 3, 4, 10, 22

Rizzuto v. L.A. Wenger Contracting Co., Inc.,
91 N.Y.2d 343 (1998) 9, 13

Roper v. United States,
368 U.S. 20 (1961) 19, 20

Ross v. Curtis-Palmer Hydro-Electric Co.,
81 N.Y.2d 494 (1993) 9

Runner v. New York Stock Exchange,
13 NY3d 599 (2009) 13

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) ..... *passim*

Stewart v. Dutra Construction Co.,
543 U.S. 481 (2005) ..... *passim*

Tagliere v. Harrah's Ill. Corp.,
445 F.3d 1012 (7th Cir. 2006) 16

Victory Carriers v. Law,
404 U.S. 202 (1972) 26

West v. United States,
361 U.S. 118 (1959) 19, 20

Wilburn Boat Company v. Fireman's Fund Insurance Company, 348 U.S. 310 (1955) 28-29

Yamaha Motor Corporation v. Calhoun,
516 U.S. 199 (1996) 28

Statutes:

1 U.S.C. § 3 ..... 1, 12, 17

28 U.S.C. § 1257 1

33 U.S.C. §901 1

33 U.S.C. §902 1

33 U.S.C. §903 1

33 U.S.C. §904 1

33 U.S.C. §905(b) ..... *passim*

33 U.S.C. §933 ..... 1, 2, 9, 10, 11

46 U.S.C. §30104 16

Labor Law §240 ..... *passim*

Labor Law § 241(6) ..... *passim*

CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

The New York Court of Appeals's opinion is reported at 13 N.Y.2d 382 and 892 N.Y.S.2d 294 and reprinted in Appendix A to the Petition ("Pet. App.") at 1a-20a. The opinion of the Appellate Division, First Department is reported at 55 A.D.3d 124 and 863 N.Y.S.2d 164 and reprinted at Pet. App. B at 21a-55a. The opinion of the Supreme Court, New York County, is unreported, and is reprinted at Pet. App C at 56a-87a. The Court of Appeals March 25, 2010 order denying rehearing is reported at 14 N.Y.2d 786 and reprinted at Pet. App. D at 88a -89a.

BASIS FOR JURISDICTION

The New York Court of Appeals entered its judgment on November 23, 2009. Petitioner applied for rehearing which was denied by order dated March 25, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

THE STATUTES INVOLVED IN THE CASE

In this case the following statutes are involved:

1 U.S.C. § 3, defining 'vessel', the provisions of which are reproduced in Appendix E.

The Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 USC §§ 901, 902, 903, 904, 905 and 933, the pertinent provisions of which are reproduced in Appendix E.

New York Labor Laws §§ 240 and 241(6), the pertinent provisions of which are reproduced in Appendix E.

STATEMENT OF THE CASE

The primary question presented here seeks to resolve a conflict among the Circuits and various state courts as to what extent land-based commercial enterprises situated on barges essentially permanently moored to land are to be considered 'vessels in navigation' since on almost like sets of facts, some courts have used the Supreme Court's holding in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) to conclude such floating structures are not vessels in navigation, e.g. *De LaRosa v. St. Charles Gaming Company, Inc.*, 474 F. 3d. 185 (5th Cir 2006) while others have found such structures to be vessels, e.g. *Board of Commissioners of the Orleans Levee District v. M/V BELLE OF ORLEANS*, 535 F.3d 1299 (11th Cir. 2008).

Related questions will arise from the court's decision about vessel status. If the structure here is not a vessel, and thus state law applies to the claim via LHWCA § 933, then the New York Court of Appeals holding that petitioner's claims were preempted necessarily will be void. If the court does find that the structure is a vessel in navigation, then the petitioner should be permitted to show that under LHWCA § 905(b), as defined in *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994) and *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167-78 (1981) state law and customs may underpin negligence claims related to alleged violations of the "active

operations" duty and "the duty to intervene" described in those cases.

Stewart v. Dutra Construction Co., 543 U.S. 481 (2005) stated the parameters for determining whether a questioned structure constituted a 'vessel in navigation' for purposes of certain applications of LHWCA. For the more difficult case of non-traditional vessels, the court looks to the "practical possibility" of a watercraft's use as a means of transportation on water for it to be a "vessel." *Id.* at 496. Unfortunately, that phrase has led to two divergent views as to what is 'practically possible". Does it mean that the structure is a vessel in navigation simply because theoretically it is possible for it to move across water, or does it refer to the more pragmatic meaning of 'practical', that is - 'given to, or experienced from actual practice'?[1] These two lines of thought are reflected in the various diametrically opposed Courts of Appeals' decisions that have analyzed the issue particularly in the context of casino gambling 'boats'. Those opinions inform the issue here as to whether a floating, but essentially permanently moored commercial power plant tied into the electrical transmission grid for New York City, is to be considered a vessel in navigation.

Fortunately, the references in *Stewart* to the many cases finding various floating structures which it considers not to be vessels, starting with *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d

---

[1] Webster's New World College Dictionary, 3d Ed., Macmillan Publishing, 1996.

560, 570 (5th Cir. 1995) provide helpful guidance to support the view that the actual practices of, and the perceived intent of the vessel owner are significant criteria for the determination. This starts with *Stewart's* view that the structure in *Pavone* was a "floating casino (which) was *no longer a vessel* where it "was moored to the shore in a semi-permanent or indefinite manner." 543 U.S. at 494. (emphasis supplied).

This and the several other cases to which *Stewart* refers provide the indicia that the determinative approach should be based more on actual practices related to the vessel, than to the theoretical use to which it could be put. This is reflected in its discussion of vessels moored more than temporarily, which, it held, were not "capable of being used" for maritime transport in any *meaningful sense* and were therefore not "vessels." *Stewart*, 543 U.S. at 494. The remote or theoretical possibility that such watercraft might one day sail again was not sufficient to make them "vessels." *Id.* at 494, 496. There must be a "practical possibility" of a watercraft's use as a means of transportation on water for it to be a "vessel." *Id.* at 496.

In light of that analysis, the New York Court of Appeals in this matter misapplied *Stewart* in holding that the power plant in question was a vessel in navigation, despite proof that in 41 years the structure never moved from its location connected to the City's electric grid, except for being towed to decennial maintenance drydockings. The Supreme Court here can heal the rift between the Circuits and clarify that it meant what it said previously that a

vessel's status will depend upon the actual practices to which it is put by its owner.

The petition also should be granted to allow the opportunity to correct the Court of Appeals's error by which it prohibited petitioner the opportunity to underpin claims of violations of the vessel owner's § 905(b) *Scindia* post-turnover duties (*Scindia Steamship Co. v. De Los Santos*, 451 U.S. 156 (1981)), the duties related to active participation in ongoing operations and the duty to intervene, by use of State law principles. The court below held that state law was preempted in all respects, even though the courts have held that a vessel owner owes a duty to exercise reasonable care to make the vessel safe if he actively participates in the operations or maintains control over the area, or if such a duty is imposed upon him by contract, law, statute or custom. See *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994) (citing *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167-78 (1981)); *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285 (5th Cir. 2008); *England v Reinauer Transp. Co.*, 194 F.3d 265 (1st Cir. 1999). It is contended here that the New York Court of Appeals erred because it prohibited petitioner from asserting § 905(b) claims based on state law violations.

A. FACTUAL BACKGROUND

The Gowanus Gas Turbines electric generation facility is a power plant owned and operated by defendants Astoria Generating Company, L.P., Orion Power New York, GP, Inc., and related companies. ("Astoria/Orion"). The site, located at 29th Street and 2nd Avenue, Brooklyn is adjacent to the navigable

waters of the Gowanus Canal, and is comprised of a system of 32 gas-fired turbine-powered generators, transmission cables and related equipment owned and operated by Astoria/Orion on a 300 foot wide property. These transmission cables are connected to the power grid operated by Consolidated Edison of New York ("Con Ed") which feeds electricity to the City. Because land is dear in New York City, and permit approvals are difficult, Con Ed, in 1969 had these power generators built on four barges (8 units on each) and permanently moored them then in the canal. In August 1999, Astoria/Orion purchased the Generating Station from Con Ed, along with several other electric generation sites. The purchase agreements require Astoria/Orion to generate electricity to sell to Con Ed, which retained its electric distribution business.

The facilities were described by the New York Court of Appeals in *Matter of Consolidated Edison of New York, Inc. v. City of New York*, 44 N.Y.2d 536 (1978) as follows:

> the property . . . as an integrated functioning whole, is known as the Gowanus switching station. The station includes land, structures thereon and other property and equipment and the property which is the subject of the present proceeding... Each barge houses eight gas turbine generators developing a total of 622,000 kilowatts, together with auxiliary equipment, associated apparatus and various connections with the shore. The electric power generated

> is transmitted by feeder cables suspended from take-off towers leading to similar towers on the pier and then to the substation. The station is linked to other stations and is part of the system through which electric power is supplied to different areas of the city as needed and forms a part of the grid (network of equipment for the distribution of electric power) linking Con Ed's power generating facilities with adjacent utility companies.

Id. at 538-39.

The Court of Appeals found that the barges were the functional equivalent of land-based structures, taxable as realty, not personalty, by noting that the "property (is) an integrated, functioning whole" for generating and distributing electricity to the City. *Id.*

Although the platforms float, they are attached to piers at the facility by way of spud beam clamping systems which allow the floating platforms to rise and fall with the tide. The platforms are connected to New York City water pipes, electrical connections to the rest of the facility, communications, remote start and fire protection lines which run through Astoria's control room located on land, and from there, to a Con Ed substation. The electricity from the 32 turbines can only be produced with these connections in place, along with fuel, water and electric utilities run from shore and a sophisticated interface with the Con Ed electric grid distribution control system. The turbines

are essential components of the electrical production system, and the generators they turn are connected always to the power grid ready to produce electricity.

Testimony from the operator confirmed that the floating platforms were built for the sole purpose of supporting the power plants and they were never intended to operate as vessels in navigation.

Approximately once a decade the barges are moved to drydock for bottom painting and maintenance. Also, on one occasion fourteen years ago, two of the four barges, not including the one in issue in this case, were moved to provide electric power at another location in the harbor. This is the only movement in 41 years of any of the four barges, and after being returned about three months later, those two barges have never moved again (except for decennial maintenance).

In 2000, Astoria/Orion hired third-party defendants Elliott Turbomachinery, Co., Inc. and Elliott Company ("Elliott"), based in Pennsylvania, to perform a 'major overhaul' of the turbines which is done every 10,000 service hours. This involved disassembling the entire turbine, shipping parts of it back to Elliott's shop in Pennsylvania for restoration or replacement, and returning it to the site for Elliott's millwrights to reassemble.

In 2001, petitioner, James Lee, a millwright employed by Elliott, injured his back while performing construction work on a turbine on Gowanus Bay #1 at the Gowanus facility. Petitioner had been ordered by his supervisor to enter the

turbine's exhaust well through a hatch to weld fixtures inside. To reach the location of the repair, petitioner used a ladder to access the exhaust well and entered the hatch. From there, he was to climb down the base of the exhaust well, but his feet slipped from under him and he fell eight feet to the base of the exhaust well, injuring his back.

Post-accident, petitioner was awarded workers compensation benefits under the LHWCA. He also commenced the underlying state court action, as permitted by 33 USC § 933, against Astoria/Orion, asserting claims, *inter alia*, under New York State Labor Law §§ 240(1) and 241(6).[2] Astoria/Orion then filed a third-party complaint seeking indemnification against Elliott.

The barge's registered owner is Astoria. The power generating equipment upon which Mr. Lee worked appears to be owned by Orion, as Orion is the company which contracted with Elliot for the repairs.

---

[2] Labor Law § 240 requires owners and contractors to provide construction workers exposed to elevation related risks specific protective devices intended to shield workers from harm directly flowing from the application of the force of gravity to an object or person. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501 (1993). Labor Law § 241(6), also applies to property owners and contractors, prescribing additional duties said contractors and owners owe to construction workers. *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998).

B. PROCEEDINGS BELOW

Elliott moved in the Supreme Court, New York County, for summary judgment dismissing the complaint and third-party complaint, arguing, among other things, that petitioner's state claims were preempted by section 905(b) and federal maritime law. Astoria/Orion also cross-moved for summary judgment, also arguing that the petitioner's claims were preempted.

In opposition, petitioner argued that the claims were not preempted because (1) the structure did not constitute a 'vessel' under section 905(b), thus his claims were properly brought via LHWCA § 933, under state law, (2) maritime jurisdiction did not apply to his claims against the power plant owners, (3) irrespective of whether or not the structure was a vessel, federal maritime law did not preempt petitioner's New York state law based tort claims designed to protect construction workers such as Mr. Lee on this project, and (4) in the alternative, New York law could create duties of the property owner in this construction project setting if it was found to be a § 905(b) claim. Supreme Court, New York County, granted the defendants and third-party defendants' motions, and dismissed the complaint. Pet. App. C at 86a-87a.

Petitioner appealed to the New York Supreme Court, Appellate Division, First Department (an intermediate appellate court in New York), which reversed, finding on the strength of *Stewart*, *supra.* and *Pavone*, *supra.* that the electric power generating station here was not a vessel in navigation, and thus,

federal maritime law was inapplicable, and state law, including Labor Laws § 240 and 241(6) were applicable to the action. Pet App. B 22a, 31a-32a. Furthermore, the Appellate Division also found that irrespective of whether or not the structure was a vessel in navigation, New York's Labor Laws would not be preempted. *Id.* 32a, 36a. The court rejected the argument that Mr. Lee's third-party claim was limited to the remedies in LHWCA § 905(b), rather it allowed his state law claims as permitted by 33 USC § 933. The court's holding was underpinned by its recognition that the work being performed was solely related to refurbishment of a land-based enterprise, the electrical generating station sitting atop the floating platform and the rest of the Second Avenue facilities. It also found that the structure essentially was permanently moored at the Gowanus Canal site based upon the fact that there was no evidence the barge in issue had ever moved in the more than 40 years before the decision, except for decennial routine maintenance. It found that structure was integrally connected to utilities and services ashore, and that there was no intent whatsoever to use the platform at any time as a means of transportation or commerce upon the navigable waters, that any transportation function was merely theoretical, and thus, it was for all purposes a land-based commercial enterprise, citing *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). *Id.* 31a-32a.

The court also performed a "conflicts" preemption analysis which found that New York's Labor Laws, both strict liability and negligence based, were not preempted by either 33 U.S.C. § 905(b) or the general maritime law. *Id.* 38a.

Regarding petitioner's Labor Law claims, the Court found that petitioner was entitled to summary judgment on his Labor Law § 240(1) claim, which relates to, among other things, the duty of owners and contractors to provide proper fall protection, and makes owners and contractors strictly liable for violation thereof. The court also found that petitioner could proceed with his Labor Law § 241(6) claims, noting that statute was negligence based, with the defense of comparative negligence available, and thus, there was no conflict between New York and federal law. *Id.* 32a.

The New York Court of Appeals reversed in a 5-2 decision. It held that the barge below the power station constituted a vessel. Pet. App. A at 2a. Five of the justices looked at the composite barge and power station as one complete 'vessel', while the two dissenting justices, observed the separate natures of the barge and power station and contended that no admiralty jurisdiction existed over the claims. Thus, claims related to this New York construction accident were covered by state law, and in particular, New York's Labor Laws designed to protect construction workers such as Mr. Lee. Pet. App. A 11a-16a.

The court noted that although the LHWCA does not define "vessel," it stated that the Supreme Court in *Stewart* provided "detailed guidance" concerning the definition and characteristics of a vessel, holding that the statutory definition of the term in 1 USC § 3 is applicable in this context. It noted that *Stewart* held that floating structures that are "not practically capable of being used as a means of transportation" do not qualify as vessels, but such

floating structures, to lose their vessel status, must be permanently fixed or moored to shore or resting on the ocean floor. *Id.* 7a-8a.

Those justices in the majority then held that since the entire structure constituted a vessel, only LHWCA § 905(b) applied to third-party negligence claims. *Id.* 8a. They performed a preemption analysis and found that petitioner's Labor Law §§ 240(1) and 241(6) claims were preempted. *Id.* 9a-10a.[3]

The dissent analyzed the structure essentially as consisting of two components, a barge and a power plant structure on top thereof, to which LHWCA § 933 would apply to tort claims arising from activities on that property. The dissent considered Mr. Lee's claim for his construction related injury while repairing the power station to be outside of the maritime jurisdiction as the general activity involved did not show a 'substantial relationship to traditional maritime activity'", citing, *Executive Jet Aviation, Inc. v City of Cleveland*, 409 U.S 249, 268 (1972) and

---

[3] The primary basis explained by the Court was that both statutes create 'strict liability' which is not permitted under a LHWCA § 905(b) claim. Although Labor Law § 240 has been held by the New York Court of Appeals to create a non-delegable strict liability (*Runner v. New York Stock Exchange*, 13 NY3d 599 (2009), Labor Law § 241(6) has not, *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343 (1998). The only explanation for lumping the two together would be that the court was referring to both creating non-delegable duties.

Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co., 513 U.S 527(1995). *Id.* 14a-16a.

Relying upon *McLaurin v. Noble Drilling (US) Inc.*, 529 F3d 285 (5th Cir. 2008), the dissent noted that:

> the plain language of section 905(b) makes recovery under that section the "exclusive remedy" where an injured employee has a cause of action for vessel negligence (33 USC 905(b). However, where, as here, the injured employee has no cause of action for vessel negligence under maritime law, section 933 of the LHWCA expressly recognizes and preserves state law causes of actions against third parties, including vessel owners who are not also employers.

Id. 19a.

The dissent stated that Mr. Lee should have been permitted to assert state law causes of action in tort under §933. *Id.* 18-a. The dissent found that it was appropriate, therefore, to apply the Court of Appeals holding in *Cammon v City of New York*, 95 NY2d 583 (2000), which permitted Labor Law claims, without federal preemption, by LHWCA-covered construction workers against property owners and non-employer contractors in projects involving land-based structures. The dissent finds no distinction between the power plant here fortuitously upon a barge because of space and zoning issues, with the sanitation

transfer station structure being constructed in *Cammon*. *Id.* 17a-18a.

The majority considered all issues resolved once they decided that Mr. Lee's claim could only be asserted against Astoria/Orion as vessel owner under section 905(b), and could not be based under state law under section 933. It found that § 905(b) preempted any New York State law cause of action. In so doing, it decided *sub silencio* against petitioner's contention that even if relegated to a 905(b) claim, petitioner still could rely on state law to assert that claim, pursuant to *Scindia Steamship Co. v. De Los Santos*, 451 U.S. 156 (1981). That case held that a vessel owner's duties to an injured LHWCA recipient include causes of action in negligence against the vessel for violations of the "active operations" duty and "the duty to intervene". Courts have held that those duties, as discussed in Point III, *infra.*, can be derived from local laws and customs.

Petitioner re-raised this issue in his motion for rehearing to the Court of Appeals, which denied the application by order dated March 25, 2010. Pet. App. D at 88a-89a.

REASONS FOR GRANTING THE PETITION

I. THE GOWANUS BAY #1 WAS INCORRECTLY FOUND TO BE A VESSEL IN NAVIGATION

This case presents an exceptionally important question of federal maritime law that has not been settled by this Court, and on which the Circuits, and various state courts, are in conflict: Are land-based commercial enterprises such as power generating stations and gambling casinos that fortuitously are situated on floating structures which essentially are permanently moored 'vessels in navigation'? The answer to that question is of paramount importance to future determinations of applicability of the Jones Act, 46 USC § 30104 et seq. and LHWCA.

The genesis of the problem stems from the Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), where the Court seemed to make clear that land-based commercial enterprises on floating platforms which are not involved in waterborne commerce are not vessels for purposes of LHWCA or the Jones Act. This is the holding of *De LaRosa v. St. Charles Gaming Company, Inc.*, 474 F. 3d. 185 (5th Cir 2006) and *Howard v. S. Ill. Riverboat Casino Cruises*, Inc., 364 F.3d 854 (7th Cir. 2004), *cert. denied*, 543 U.S. 942 (2004).[4]

---

[4] The Seventh Circuit has noted that its test must be applied with due consideration to the *Stewart* decision, *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006). However, *Tagliere* did not purport to overrule *Howard* or

However, reading the same authorites, including *Stewart*, the 11th Circuit in *Board of Commissioners of the Orleans Levee District v. M/V BELLE OF ORLEANS*, 535 F.3d 1299 (11th Cir. 2008) found a floating casino that was taken out of navigational service and was essentially permanently moored, was a vessel in navigation because of its possible future ability to sail. In essence, the 11th Circuit reduces the test to whether the structure floats or not, because if it does, it could possibly be used to transport across water. Further, the 11th Circuit eschews any analysis of owner intent, and gives almost no consideration to what is the actual use of the vessel. 535 F.3d at 1311.

A. THE SUPREME COURT'S DEFINITION OF 'VESSEL'

The Supreme Court in *Stewart*, building on prior precedent, and the Congressional definition in 1 USC § 3 defined the term "vessel" for purposes of determining rights and obligations under the maritime law. To start, the Supreme Court has noted, "the fact that [a structure] floats on the water does not make it a ship or vessel," *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627 (1887).

In *Stewart*, the court defined one of the parameters for vessel status as having some level of capacity for maritime transportation. If this capacity is absent, then vessel status would likely be denied.

---

suggest it did not properly apply the *Stewart* analytical framework.

The court noted, "[s]imply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Stewart*, 543 U.S. at 494. Since an owner may do things to render a vessel to be incapable of transportation or movement, an owner's intent must be considered, particularly in hindsight, as to what has actually occurred to the vessel. The *Belle of Orleans* espouses a misguided view that owner's intent is to be disregarded and essentially reduces the analysis, contrary to Supreme Court teaching, to 'does the thing float'? This was not *Stewart*'s intent, because *Stewart* holds that structures that have been permanently moored or otherwise rendered, *by their owners*, which are practically incapable of transportation or movement, *are not* vessels in navigation. 543 U.S. at 494.

In addition to the fact that simply because something floats does not make it a 'vessel in navigation', the Supreme Court also limited the role of theoretical capability of use as a means of transportation as a determinative factor. It noted that when a craft is permanently moored or otherwise rendered incapable of transportation or movement, that craft will not be a 'vessel' for maritime law purposes because it is then not "practically capable" of navigation. This, the Court noted, excludes those many situations where special use watercraft are permanently affixed to shore or resting on the ocean floor, and thus, unworthy of vessel status. 543 U.S. 481, 492-494. Thus, for a craft to have "vessel" status, it must be "in and practically capable of navigation". The Court explained:

> the Court has sometimes spoken about the requirement that a vessel be "in navigation", but never to indicate that a structure's locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of tir ... The Court did not mean that the "in navigation" requirement stood apart from § 3, such that a "vessel" for purposes of § 3 might nevertheless not be a "vessel in navigation" for purposes of the Jones Act or the LHWCA. Instead, the "in navigation" requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is "used, or capable of being used" for maritime transportation... The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely theoretical one.

543 U.S. at 496.

West v. United States, 361 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961), referenced in *Stewart*, exemplify how floating structures which once qualified as 'vessels in navigation' lose that status via their owner's intentions, and claims asserted against them become no longer subject to maritime law. These cases also show, further, that occasional movements of those structures, unrelated to commerce or transportation, will not re-bestow

vessel status thereupon. In *West*, a mothballed Liberty Ship transported to a repair yard to be reactivated was found not to be a 'vessel' in its otherwise deactivated state simply because it had been towed. In *Roper*, another mothballed former Liberty Ship, used for grain storage, was found not to be a 'vessel in navigation' despite its movement to an unloading facility because it had been permanently converted to have no maritime transportation or commercial purpose.

The New York Court of Appeals in deciding below that the structure in issue was a vessel in navigation, placed reliance on the fact that the crafts were moved about every ten years to a shipyard for painting and maintenance. It noted further that in the past 41 years that these electric generating structures were on site, on one occasion, 14 years ago, two of the four barges on site, but not the one upon which Mr. Lee was injured, were moved briefly to another generating station and returned. This insignificant event should have highlighted to the court the permanency of the mooring of the structures.

Stewart teaches that it is appropriate to deny vessel status to those floating craft which are primarily put to benefit land-based enterprises, with little or no transportation function foreseeable, just like the Astoria/Orion power plant floating platform here. *Stewart*, 543 U.S. at 496. Supporting that conclusion, the Supreme Court referred to *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), which found that a floating wharfboat secured by cables to the shore and connected to onshore utilities "was not practically

capable of being used as a means of transportation". *Stewart*, 543 U.S. at 493. The floating platform there did not qualify as a vessel even though each winter the wharfboat was towed to a protected harbor to shield it from ice. The inquiry turned on the craft's lack of maritime purpose, since it primarily served "as an office, warehouse and wharf, and was not taken from place to place. The connections with water, electric light and telephone systems of the city evidence a permanent location." *Id.* That description is strikingly similar to the platform here.

The *Stewart* Court explained why a craft primarily assisting land-based activities is excluded from being a vessel in navigation, as follows:

> This distinction is sensible: A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See, *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner").

543 U.S. at 494.

Pavone's exclusion of craft that "are moored to the shore in a semi-permanent or indefinite manner", accordingly, was fundamental to the *Stewart* decision. Following *Stewart*, came the Fifth Circuit's decision in *De LaRosa v. St. Charles Gaming Company, Inc.*, 474 F. 3d. 185 (5th Cir 2006), where a patron of a floating, tied-up gambling casino was injured. She sought federal admiralty jurisdiction over the claim, alleging that she fell on a "vessel". The Fifth Circuit affirmed the District Court's dismissal of the complaint for lack of admiralty jurisdiction, stating that a party "seeking to invoke federal admiralty jurisdiction.., over a tort claim must satisfy conditions of both location and connection with a maritime activity." The court noted that in *Pavone v. Mississippi Riverboat Amusement Corp*, 52 F.3d 560 (5th Cir. 1995) it had held that "indefinitely moored, shore-side, floating casinos' such as the one (in issue) are not vessels under general maritime law." *Id.* The court considered the impact of *Stewart* and concluded that the Supreme Court would agree that the floating casino was "not 'capable of being used' (as a vessel) ... in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *De LaRosa*, 474 F. 3d. at 187, *citing, Stewart,* 543 U.S. at 494. It further stated:

> With regard to the impact of *Stewart*, we also note that Justice Thomas, the author of the Stewart opinion, cited our decision in *Pavone* to support the view that "ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day

> sail again." 543 U.S. at 494. Although the Crown Casino was not literally taken out of the water, neither was the floating casino in *Pavone*, and we therefore consider the Supreme Court's reliance on *Pavone* to be instructive in this case.

474 F. 3d at 188 fn. 2.

Further instruction on vessel status comes from the *Stewart* Court's reaffirmation of *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), where it had found that a floating drydock, which during normal use would be sunk then raised up under a craft to lift it out of the water to be repaired, was a "fixed structure" that had been "permanently moored" to the mainland by chains and spars, rather than being a vessel that had been temporarily anchored. The Supreme Court affirmed dismissal of the lawsuit for lack of maritime jurisdiction, concluding that the dry dock was not a vessel in navigation. *Stewart* cited *Cope* with approval. See, 543 U.S. at 493.

Stewart also approved the decision in *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) which found the UNISEA, a former ship turned into a floating fish processing plant, was not practicably capable of transportation over the water, thus no longer a vessel in navigation. Significant was that, in its then-current configuration, the vessel was "designed as a floating factory - merely extending land over water for the purpose of increasing the usable space of a dock-side fish processing operation", 975 F.2d at 660. *See, Stewart*, 543 U.S. at 494. That description is very similar of the Astoria/Orion power

plant structure here which extends the useable space of the land-based power generation distribution facility, as acknowledged by respondent's witness.

The Supreme Court notes that it is not necessarily significant that the structure floats and moves to conform to the tide stage of the water body, or is moved to protect it from weather or for inspections. *Evansville, supra.*, 271 U.S. at 20-21. This contradicts the significance defendants place upon the fact that approximately every 10-15 years the floating platform here is moved for dry-docking to have paint put on its steel.

Accordingly, the floating turbine facility here should not be considered a vessel in navigation under these principles, because it was permanently moored, and served no maritime transportation purpose. It has no more than a mere remote possibility that it may one day sail, and it has been moored to the shore in a permanent manner for some 41 years. It is designed solely to provide electric power to local communities. It received utilities from shore and provided back power via connections running over Astoria's property to a Con Ed substation. It is not self-propelled, has no crew, and was designed for the purpose of being a component to an electrical distribution network, owned and operated by the land owners, Astoria and Orion, and was not meant to be a means of transportation or maritime commerce. These facts highlight the permanency of its withdrawal from navigation and lack of maritime commerce function, disqualifying it from being a vessel in navigation. As such, petitioner's injury did not occur on a 'vessel in navigation' nor on a maritime situs, and maritime

jurisdiction should be rejected, warranting application of New York law, and making inapplicable 33 USC § 905(b)'s potential restrictions on third-party suits.

II. NO MARITIME JURISDICTION EXISTS OVER THE INJURY OCCURRING ON THE POWER PLANT PORTION OF THE STRUCTURE, ACCORDINGLY, THE COURT BELOW ERRED IN FINDING PETITIONER'S CLAIM AGAINST THE POWER PLANT OWNER PREEMPTED

The gas turbine power plant structure atop Gowanus Bay #1 alone is the structure which should be analyzed for purposes of vessel status in this matter, not the platform upon which it was situated. Involved here was no ship repair or vessel overhaul. Defendants have admitted that the "[p]laintiff's work did not affect the structural integrity of the barge, and his work on the turbine did not affect 'an integral part of the barge's structure.'" Rather, the overhaul involved here was of a turbine component integral to defendants' joint venture to supply electricity to New York City. It is irrelevant whether this turbine generator was located on a concrete platform on solid ground, or upon a hollow steel platform floating on water, a choice here made merely for the financial needs and space conserving necessity of the defendants, rather than for any calculated nautical enterprise.

Simply having a claim that immaterially relates to a structure afloat does not create maritime jurisdiction or require application of federal law, as decades ago was held in *Grant Smith-Porter Ship Co.*

v. Rohde, 257 U.S. 469 (1922). There the Supreme Court held that where an injury occurs on a vessel structure under construction, although floating in navigable waters, the claim did not occur within the maritime jurisdiction, because the structure involved was not a vessel in navigation. For maritime jurisdiction to exist over a tort claim, the party asserting that jurisdiction must show the activity involved satisfies conditions of both maritime location and connection with a maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Where it is absent, state law applies. *Victory Carriers v. Law*, 404 U.S. 202 (1972), *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 291-93 (5th Cir. 2008).

The New York Court of Appeals rejected petitioner's arguments that the nature and extent of repairs may be such that the vessel will be considered to be withdrawn from navigation. "At some point... repairs (to a vessel in dry dock) become sufficiently significant that the vessel can no longer be considered in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995). Here, all eight of the turbines were in the process of being disassembled, then reassembled after their major components were sent to a plant in Pennsylvania for refurbishment which took months to complete. During that time, the power plant equipment was withdrawn from its interconnection to the power grid, and as such, the 'vessel' itself should have been considered as withdrawn from navigation. In such case, the Court should have found that neither the maritime law nor §905(b) would be applicable to Mr. Lee's claim. Applying this reasoning, furthermore, if the repairs are not even to the vessel,

but to a land-based enterprise affixed to a floating structure, and not having been transported for over 41 years, that enterprise, should not be considered a vessel in navigation in the first place.

As shown in *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285 (5th Cir. 2008), when all elements of admiralty jurisdiction over a longshore benefits recipient's potential third party injury claim do not exist, a section 905(b) claim is not assertable. The remedy to the worker, if one exists, is a third-party claim relying on state law asserted pursuant to section 933. *Id.* at 289-93; *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir. 1986).

Section 905(b) permits only the assertion of a claim for a maritime tort, *McLaurin, supra.* at 289, *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir. 1986), and thus, "[o]nly if a claimant first alleges facts comprising a maritime tort do we need inquire whether he has established the specific elements of a § 905(b) cause of action..." *McLaurin*, 529 F.3d at 290.

Petitioner here did not allege a maritime tort against the vessel and the power plant's owner. Rather, petitioner only asserted causes of action against Astoria/Orion as the owner of a land-based enterprise construction site regulated by state statutes and regulations. Petitioner asserts that the activity here, reconstruction of a land-based power house and related facilities, is not a traditional

maritime activity, thus, maritime jurisdiction is absent.[5]

Here petitioner's claims are against the real property owner and land-based commercial enterprise operator, Astoria/Orion. As recognized in prior decisions of the Court of Appeals, a claim against the real property owner by a maritime construction worker may be brought under section 933, which allows applicable state law causes of action, including New York Labor Laws §§ 240 and 241(6), to be asserted without being preempted by maritime law. *Cammon v. City of New York*, 95 N.Y.2d 583, 590 (2000).[6]

---

[5] See *King v. President Riverboat Casino-Mississippi*, 894 F. Supp. 1008 (S.D. Miss. 1995) where, in finding a floating casino not to be a vessel in navigation, the court noted that its non-vessel status factors weighed heavily to support the conclusion that maritime jurisdiction was absent because no traditional maritime activity was involved. "In essence, the Court finds that the factors ... that relate to the transportation function and primary purpose of the structure, are relevant, not only in determining vessel status, but also in determining ... whether the activity in question was substantially related to traditional maritime activity." *Id.* at 1011

[6] Petitioner also contends that even if maritime law applies to the claims, his state law claims would not be preempted under traditional preemption principles. See, e.g., *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996) *Wilburn Boat Company v. Fireman's Fund*

See, also, *Palanquet v. Weeks Marine, Inc.*, 333 F. Supp. 2d 58 (E.D.N.Y. 2004) where the court found that the injury to a construction worker who was assisting in rebuilding a bridge over navigable waters (who fell while climbing a ladder from a barge to the bridge) was not within the maritime jurisdiction. The court stated:

> Unlike the repair of a "fending system" [referring to *Cammon*] to aid navigation in waters ... the repair of the side surface of a bridge has little effect on the navigation of vessels in the waters below. The injury and the acts leading to the injury could have occurred on a construction site where admiralty jurisdiction would not be applicable. Despite the situs of the injury occurring on navigable waters, I find that federal maritime law is inapplicable because the "wrong" lacks an adequate relationship to traditional maritime activity. Moreover, even assuming arguendo that federal admiralty jurisdiction is applicable here, plaintiffs' claim under the New York Labor Law would not be preempted. See Gravatt, 1998 WL 171491, at *14 (finding that the strict liability theories under the New York Labor Laws are not inconsistent with maritime law); see also Cammon v. City

---

Insurance Company, 348 U.S. 310, 313-314 (1955); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

> of New York, 95 N.Y.2d 583, 590 (2000) (finding that New York Labor Law provisions allowing liability predicated on fault are consistent with federal maritime principles).

333 F.Supp. 2d at 66.

An entity subject to potential section 905(b) liability as owner of a vessel, in which assertion of that claim fails for want of admiralty jurisdiction over said claim, may also be sued in its construction contractor or site owner capacity pursuant to § 933, *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285, 292 (5th Cir. 2008).

> [A] maritime worker may attempt to recover against a vessel owner for vessel negligence under § 905(b), against a vessel owner as a third-party tortfeasor under § 933, or even against a vessel owner as a "borrowing employer" under § 904. It is not a vessel owner's status as a vessel owner that dictates which LHWCA provision a maritime worker may use; it is the type of negligence that the worker alleges and the duty that is owed by the vessel owner that is controlling.

Id.

Summarizing the interplay of § 905(b) and § 933, and the entitlements under § 933 to bring state

law based claims against a shipowner, the Court stated:

> Here, the (plaintiffs) did not allege a claim against Noble Drilling specifically under § 933, but they did allege negligence claims under state law in their Complaint. If a maritime worker recovers against a vessel under § 905(b), then he may not also sue the vessel in tort. The (plaintiffs) cannot recover from Noble Drilling as a vessel owner because they cannot state a cognizable claim for vessel negligence under § 905(b), so the language of § 905(b) does not preempt their state-law claim against Noble Drilling as a third-party tortfeasor. The plain language of § 933 clearly contemplates and preserves a maritime worker's ability to pursue separate claims against third parties, including vessel owners allegedly responsible for the injury.[7]

---

[7] McLaurin worked in a shipyard preparing pontoons which would be attached to an oil rig afloat nearby. He was injured when a load suspended by a crane fell upon him. Since his injury occurred on land, the 5th Circuit held he could not assert a section 905(b) claim against the vessel owner, Noble. However, under state law, plaintiff was allowed to claim Noble was negligent in its capacity as supervisor of the construction project in failing to exercise due care in ensuring proper safety practices including the

The situation presented in *McLaurin* is very similar to that presented in the within matter. The Court of Appeals erred, however, in finding that petitioner only was permitted to state a maritime claim against the vessel (and Astoria/Orion as its owner) under section 905(b) rather than finding petitioner also could assert his state law based claims under section 933 against Astoria/Orion as property owner and contractor with rights and obligations defined by New York's Labor Laws. Accordingly, that determination ultimately should be reversed by the Supreme Court.

III. STATE LAW MAY CREATE THE *SCINDIA* 'ACTIVE OPERATIONS' DUTY AND DUTY TO INTERVENE UNDER LHWCA SECTION 905(b)

Assuming that the power plant structure must be considered a vessel in navigation, and further that 33 USC § 905(b) applies to the claims asserted by the petitioner, the New York Court of Appeals erred in dismissing the case without requiring the lower court to consider whether under *Scindia Steamship Co. v. De Los Santos*, 451 U.S. 156 (1981) petitioner could state causes of action in negligence against the vessel for violations of section 905(b)'s "active operations" duty and "duty to intervene" derived from the construction industry statutory directives and customs mandated by New York's Labor Law §§ 240 and 241(6).

---

on-shore pontoon building activity in which he was engaged. *McLaurin*, 529 F.3d. at 292 fn.8.

Under § 905(b), a vessel owner owes a duty to exercise reasonable care to make the vessel safe if he actively participates in the operations or maintains control over the area, or if such a duty is imposed upon him by contract, law, statute or custom. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994) (citing *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167-78 (1981)); *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285 (5th Cir. 2008); *England v Reinauer Transp. Co.*, L.P., 194 F.3d 265 (1st Cir. 1999).

The relevant duties derived from *Scindia* and *Howlett* are succintly summarized in *England*:

> Second,[8] the vessel is liable for a breach of its "active control duty" if it "actively involves itself in the cargo operations and negligently injures a longshoreman" or "if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." *Scindia Steam*, 451 U.S. at 167; see also *Howlett*, 512 U.S. at 98. Third, under the "duty to

[8] The first duty, the breach of which is not asserted here, is the "turnover duty" to warn the longshoremen of hazards from gear, equipment, tools, and the workspace to be used in cargo operations "that are known to the ship or should be known to it in the exercise of reasonable care. *England*, 194 F.3d at 270.

> intervene," the shipowner has a duty only if "contract provision, positive law, or custom" dictates "by way of supervision or inspection [that the shipowner] exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." *Scindia Steam*, 451 U.S. at 172 (holding that when no contract, positive law, or custom was alleged, shipowner was not responsible for dangerous condition arising during cargo loading operations); see also *Howlett*, 512 U.S. at 98.

194 F.3d at 270-71.

In *England*, a stevedore who collected LHWCA benefits under section 904 asserted a section 905(b) claim against the vessel when one of its mooring lines parted and struck him causing serious injury. The court held that the vessel owner involved properly was found to have breached an active operations duty and duty to intervene created by local custom that its employees would inspect mooring lines before and during the time that the vessel was turned over to the stevedore.

Similarly, it has been held that New York Labor Law can supply the vessel owner's duties under section 905(b) in New York harbor-based construction activities. *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 67-70 (2d Cir. 2002). Although this very issue was specifically raised to the Court of Appeals,

inexplicably it failed to analyze it. It is significant for these local laws, regarding local issues such as construction, to be allowed to be applied for the protections of workers. There is no policy-based justification for excluding the state from enforcing laws it has found necessary to protect workers, which is a traditional state function. In the present matter, only by creative lawyering did defendants employ the concept of federal preemption to insulate themselves from the regulations which apply to thousands of other similar construction sites in the surrounding areas near the power plant, the only difference being that the platforms for them are on solid ground while the platform here was floating, although permanently moored.

The Supreme Court, if it finds that the whole power plant constitutes a vessel and limits petitioner only to a § 905(b) claim, should remand this action with instructions that petitioner is entitled to prove that New York's Labor Laws created duties which are imposed on the owner of this structure and enforceable under §905(b) and not preempted by federal law.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

Paul T. Hofmann
HOFMANN & ASSOCIATES
360 W. 31st Street
New York, N.Y. 10001
(212) 465-8840
Paulhofmann@hofmannlawfirm.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS DATED NOVEMBER 23, 2009

No. 161

James D. Lee,

Respondent,

v.

Astoria Generating Company, L.P., et al.,

Appellants,

Astoria Generating Company, L.P., et al.,

Third-Party
Plaintiffs-Appellants.

v.

Elliot Turbomachinery Co., Inc., et al.,

Third-Party
Defendants-Appellants.

Appendix A

JONES, J.:

In this appeal, we are called upon to determine whether a barge containing an electricity generating turbine is a vessel under 33 USC § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA) and whether that provision preempts New York State Labor Law §§ 240(1) and 241(6) claims. We hold that the barge is a vessel and plaintiff's Labor Law §§ 240(1) and 241(6) claims are preempted.

The Gowanus Gas Turbines electric generation facility in Brooklyn is a facility owned and operated by defendants Astoria Generating Company, L.P., Orion Power New York, GP, Inc., Orion Power L.P. and Orion Power New York, LP, LLC (Astoria/Orion). The site, located on navigable waters in the Gowanus Canal, is comprised, in part, of four barges that are each 80 feet wide by 200 feet long that collectively house eight individual gas turbine generating units. While stationed, the barges are afloat in the bay and connected to a power grid. Periodically, approximately once a decade, the barges are moved to drydock for maintenance. They are also capable of being moved for the purpose of providing electric power at other locations. Two of the barges had been so moved on at least one occasion.

In 2000, Astoria/Orion hired third-party defendants Elliott Turbomachinery, Co., Inc. and Elliott Company (Elliott), a company based in Pennsylvania, to perform an overhaul of the turbines at the Gowanus facility. This involved disassembling the entire turbine, shipping parts of it back to Elliott's

shop in Pennsylvania for restoration or replacement, and returning it to the site for Elliott's millwrights to reassemble. In 2001, plaintiff, a millwright employed by Elliott, injured his back while performing work on a turbine on barge number one at the facility. According to plaintiff, he was ordered by his supervisor to enter the turbine's exhaust well through a hatch to weld some fixtures inside. To reach the location of the repair, plaintiff used a ladder to access the exhaust well and entered the hatch. From there, he was to climb down the base of the exhaust well, but his feet slipped from under him and he fell eight feet to the base of the exhaust well, injuring his back.

After the accident, plaintiff claimed and was awarded benefits under the LHWCA, which "provides workers' compensation to land-based maritime employees" (*Stewart v Dutra Constr. Co.*, 543 US 481, 488 [2005]). He also commenced this state court action against Astoria/Orion, asserting Labor Law §§ 200, 240(1) and 241(6) claims and common law negligence claims. Astoria/Orion subsequently filed a third-party complaint against Elliott seeking indemnification.

Elliott moved for summary judgment dismissing the complaint and third-party complaint, arguing, among other things, that 33 USC § 905(a)[1]

---

[1] "The liability of an employer prescribed in section 904 of this title shall be exclusive in place of all other liability of such employer to the employee" (33 USC § 905[a]). Section 904 provides that "[e]very employer shall be liable for and shall secure the payment to his employees

precludes lawsuits against it as an employer of the injured worker and that plaintiff's state claims were preempted by section 905(b)[2] and federal maritime law. The barge owners cross-moved for summary judgment, also arguing that the plaintiff's claims were preempted. In opposition, plaintiff argued that the claims were not preempted because (1) the barge did not constitute a vessel under section 905(b) and (2) maritime jurisdiction did not apply to his claims against the barge owners.

Supreme Court granted summary judgment dismissing the complaint and third-party complaint. It concluded, among other things, that section 905 of the LHWCA preempted the Labor Law 240(1) and 241(6) claims. The court adopted the Department of Labor's determination that plaintiff is a covered employee under the LHWCA and concluded the barge is a

---

of the compensation payable under sections 907, 908 and 909 of this title."

[2] "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . The remedy provided in this Subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter" (33 USC § 905[b]).

vessel under recent federal case law. It also dismissed plaintiff's Labor Law § 200 and common law negligence claims.

The Appellate Division "reversed" the Supreme Court order, reinstated plaintiff's Labor Law §§ 240(1) and 241(6) claims and granted summary judgment as to the Labor Law § 240(1) claim in plaintiff's favor.[3] It held that the Labor Law claims are not precluded by the LHWCA because the barge is not a vessel, It further stated, "even if the barge were a vessel, federal maritime jurisdiction would not preempt these claims" (55 AD3d 124, 126 [1st Dept 2008]), The Appellate Division granted Astoria/Orion and Elliott leave to appeal and certified the following question to this Court: "Was the order of this Court, which reversed the order of Supreme Court, properly made?" We now reverse and answer the certified question in the negative.

The LHWCA provides compensation to workers injured on navigable waters of the United States in the course of their employment (*Director, Office of Workers' Compensation Programs, United States Department of Labor v Perini North River Associates* 459 US 297, 325 [1983]; *see Chandris, Inc.*

---

[3] It appears that the Appellate Division affirmed the dismissal of plaintiff's Labor Law § 200 and common law negligence claims. Astoria/Orion did not appeal the denial of that part of their summary judgment motion that sought relief on the third-party complaint.

v Latsis, 515 US 347, 360 [1995]).[4] It operates as a no fault workers' compensation scheme for eligible workers and precludes recovery of damages against their employer (33 USC § 905[a]). The LHWCA also permits an injured employee to recover damages against a third person other than his or her employer (33 USC § 933[a]). Section 905(b) of the LHWCA, consistent with § 933(a), permits an injured person covered under the Act to bring an action in negligence against a vessel, but provides that such remedy "shall be exclusive of all remedies against the vessel except remedies available under this chapter." Contrary to the dissent's position, one need not conclude that plaintiff is entitled to assert a maritime tort claim to invoke section 905(b) where the worker was injured on navigable waters (*see Stewart*, 543 US 481 [discussing

---

[4] In *Perini North River*, the Supreme Court explained the history of the LHWCA. Prior to 1972, the LHWCA applied only to injuries that occurred on navigable waters (*Perini North River*, 459 US at 313). In 1972, Congress expanded the coverage landward and created a scope of persons covered, which became the situs and status test (*id.* at 317-318). The *Perini North River* Court then held that "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement . . . and is covered under the LHWCA (*id.* at 324). The Court noted that "Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered" (*id.* at 319).

the application of section 905(b) without any maritime tort inquiry]).[5] Section 905(b) of the LHWCA applies to the "injury of a person covered under this chapter" where the liability of a vessel is at issue. Thus, because the LHWCA covers plaintiff's injury upon navigable waters, whether section 905(b) applies in this case hinges upon whether the structure upon which plaintiff was injured is a vessel. Although the LHWCA does not define "vessel," the United States Supreme Court has provided detailed guidance concerning the definition and characteristics of a vessel, holding that the statutory definition of the term in 1 USC § 3 is applicable in this context.

---

[5] The dissent's reliance upon *Executive Jet Aviation, Inc. v City of Cleveland* (409 US 249 [1972]) and *McLaurin v Noble Drilling, Inc.* (529 F3d 285 [5th Cir 2008]) is misplaced—neither of those cases involved claims traditionally covered under the LHWCA. The Supreme Court created the maritime tort inquiry in *Executive Jet*. There, the Court "concluded that maritime locality alone is not a sufficient predicate for admiralty jurisdiction in aviation tort cases" (409 US at 261). In *McLaurin*, the Fifth Circuit continued the use of such inquiry in the context of a shipyard accident. The court, noting that "[i]njury on navigable waters is a sine qua non of the maritime tort, . . . held that a maritime worker injured on dry land cannot sustain a cognizable injury under § 905(b) of the LHWCA" (529 F3d at 290 [internal quotation marks and citation omitted]).

Appendix A

A "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (*Stewart v Dutra Construction Company*, 543 US 481, 489 [2005], *quoting* 1 USC § 3). Structures temporarily stationed in a particular location maintain their status as vessels. However, floating structures that are "not practically capable of being used as a means of transportation" do not qualify as vessels (*id.* at 493 [internal quotation marks and citation omitted]). Such floating structures (non-vessels) are permanently fixed or moored "to shore or resting on the ocean floor" (*id.* at 493-494).

Here, the barge, located on navigable waters in the Gowanus Bay, is a vessel within the LHWCA. The barges owned by Astoria/Orion have been tugged on water approximately once a decade to a maintenance station and, at least once, to provide energy to another part of New York City in an emergency. Thus, the barge at issue is practically capable of being used as a means of transportation on water. Although the barge is stationed at the Gowanus facility, because it is not permanently anchored or moored, it has not lost its status as a vessel. Accordingly, the barge is a vessel under section 905(b).

The remaining issue is whether section 905(b) preempts plaintiff's Labor Law §§ 240(1) and 241(6) claims. It is well recognized that the Supremacy Clause (U.S. Const., art VI, cl.2) "'may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law'" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 356

[2006], *quoting New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654 [1995]). Congress' intent to preempt "may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law (*Cipollone v Liggett Group, Inc.*, 505 US 504, 516 [1992]). State law will not "be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress" (*New York State Conference of Blue Cross & Blue Shield Plans*, 514 US at 655).

Here, the LHWCA clearly states in section 905(b) that an action in negligence may be brought against a vessel and that such remedy "shall be exclusive of all other remedies against the vessel except remedies available under this chapter" (33 USC § 905[b]). Congress clearly intends that actions maintained against a vessel be brought solely within the confines of the LHWCA and nowhere in the Act does it permit strict liability claims, as provided in Labor Law §§ 240(1) and 241(6). Therefore, section 905(b) of the LHWCA expressly preempts plaintiff's Labor Law §§ 240(1) and 241(6) claims. Contrary to the Appellate Division's alternative holding, *Cammon v City of New York* (95 NY2d 583 [2000]) does not support the premise that New York's Labor Law is not preempted by section 905(b). *Cammon* involved an injured worker receiving benefits under the LHWCA and a defendant landowner. Thus, this case did not involve section 905(b), "Negligence of vessel," as set

forth in the LHWCA. While it is true that Federal maritime law does not generally supersede state law (*see Cammon*, 95 NY2d at 587), in this case, where Congress explicitly limited claims against the vessel owner to that Federal Act, state law claims are preempted.

Accordingly, the order of the Appellate Division should be reversed, with costs, the order of Supreme Court reinstated and the certified question answered in the negative.

Appendix A

CIPARICK, J. (dissenting):

Because plaintiff cannot assert a maritime tort claim for vessel negligence against the vessel owner, section 905 (b) of the Longshore and Harbor Workers' Compensation Act does not apply to preempt his state law claims. Accordingly, I respectfully dissent.

The Longshore and Harbor Workers' Compensation Act (LHWCA or the Act) (33 USC 901 *et seq.*) establishes workers' compensation benefits to "land-based maritime workers" (*Stewart v Dutra Constr. Co.*, 543 US 481, 488 [2005]; *see also McLaurin v Noble Drilling (US), Inc.*, 529 F3d 285, 289 [5th Cir 2008]). Under the LHWCA, qualified employees injured during the course of their employment may, regardless of fault, recover workers' compensation benefits from their employers (*see* 33 USC 904). An injured employee may also seek to recover against a vessel owner where the negligence of the vessel caused his or her injuries (see 33 USC 905 [b]). Specifically, section 905 (b) of the LHWCA provides,

> "In the event of injury to a person covered under [the LHWCA] caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or

> indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. *The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter*"

(emphasis added).

If there is no remedy provided by section 905 (b), there is no "exclusive remedy" that preempts state law actions. Section 905 (b) does not create a new statutory negligence cause of action or maritime tort, nor does it extend or create new admiralty jurisdiction (*see Richendollar Diamond M Drilling Co.*, 819 F2d 124, 128 [5th Cir 1987]). Rather, it merely preserves an injured employee's right to recover for vessel negligence under existing maritime law (*see Kerr-McGee Corp. v Ma-Ju Mar. Servs., Inc.*, 830 F2d 1332, 1339 [5th Cir 1987]; *see also Matter of Donjon Mar. Co.*, 2008 WL 3153721 [SD NY 2008]). If a plaintiff cannot state a cause of action for a maritime tort, section 905 (b) does not provide any remedy and so does not apply to preempt state law causes of action against vessel owners (*see McLaurin*, 529 F3d at 289; *see also Robertson v Arco Oil & Gas Co.*, 766 F Supp 535, 537-538 [WD La 1991] [where the plaintiff's claim fell within admiralty jurisdictions, "[h]is maritime law remedy against the vessel owner ... consist[ed] of a section 905 [b] suit for negligence]).

Thus, to determine whether a plaintiff's state claims are preempted by the "exclusive remedy" language of section 905 (b), a court must first ascertain whether the plaintiff can state a maritime tort claim for vessel negligence against the vessel owner.[1]

A tort claim qualifies as a "maritime tort" and falls under the federal courts' admiralty jurisdiction where the injury satisfies a maritime situs/status test (*see Richendollar*, 819 F2d at 127).[2] That is, "where

---

[1] This Court has a history of preserving state claims where doing so is not inconsistent with the federal scheme (*see e.g. Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105 (2008); *Arons v Jutkowitz*, 9 NY3d 393 (2007). As the Appellate Division noted, this is particularly true in cases involving the health and safety of our workers (*see e.g. Balbuena v IDR Realty LLC*, 6 NY3d 338 [2006]; *Common v City of New York*, 95 NY2d 583 [2000]), a matter which has historically been within the police powers of the state.

[2] The majority conflates the issue of workers' compensation benefits under the Act with the potential maritime tort remedy under the Act (*see* majority op, at 5-6). As to the former, a covered worker need only sustain some injury on the navigable waters to satisfy the status test for workers' compensation benefits (*see Director, Off. of Workers' Compensation Programs, United States Dept. of Labor v Perini N. River Assocs.*, 459 US 297, 324 (1983). As to the latter—the tort claim—the alleged wrong must "bear [] a significant relationship to a traditional maritime activity" (*Exec. Jet Aviation, Inc. v City of Cleveland*, 409

the wrong (1) took place on navigable waters ('situs') and (2) 'bear[s] a significant relationship to traditional maritime activity' ('status')," the alleged wrong may be susceptible to suit under a maritime tort cause of action. (*Keene Corp. v United States*, 700 F2d 836, 843 [2d Cir 1983], quoting *Exec. Jet Aviation, Inc. v City of Cleveland*, 409 US 249, 268 [1972]). In *Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co.* (513 US 527 [1995]), the Supreme Court explained the status test, or "connection" test, as having two components:

> "The connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved,' to determine whether the incident has 'a potentially disruptive impact on maritime commerce.' Second, a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'"

(*id.* at 534 [internal citations omitted], quoting *Sisson v Ruby*, 497 US 358, 363, 364 n2, 365 [1990]). The federal courts have considered various factors to determining whether an alleged wrong bears a

---

US 249, 268 [1972]). The federal courts have recently used the *Exec. Jet* test to ascertain whether a plaintiff can assert a section 905 (b) vessel negligence claim (*see e.g. McLaurin*, 529 F3d at 289).

significant relationship to traditional maritime activity, including:

> "1) the functions and roles of the parties; 2) the types of vehicles and instrumentalities; 3) the causation and type of injury; 4) traditional concepts of the role of admiralty law; 5) the impact of the event on maritime shipping and commerce; 6) the desirability of a uniform national rule to apply to such matters, and 7) the need for admiralty 'expertise' in the trial and decision of the case"

(*Ciolino v Sciortino Corp.*, 721 F Supp 1491, 1493 [D Mass 1989], citing *Shea v Rev-Lyn Contr. Corp.*, 868 F2d 515, 517-518 [1st Cir 1989], *Drake v Raymark Indus., Inc.*, 772 F2d 1007 [1st Cir 1985], *Molett v Penrod Drilling Co.*, 826 F2d 1419, 1426 [5th Cir 1987], *Oman v Johns-Manville Corp.*, 764 F2d 224, 230 [4th Cir 1985]; *Harville v Johns-Manville Prods. Corp.*, 731 F2d 775, 779 87 [11th Cir 1984], and *Kelly v Smith*, 485 F2d 520, 525 [5th Cir 1973]).

As stated by the majority opinion, here, plaintiff's injury occurred in navigable waters on a "vessel," as the Supreme Court recently broadly defined that term in *Stewart* (543 US at 495).[3] Thus,

---

[3] Stewart, although instructive for limited purposes here, is distinguishable on its facts. In that case, the plaintiff, a marine engineer, was injured when a dredge collided with a vessel (a scow) upon navigable waters (see

the "situs" test for a maritime tort sounding in negligence is satisfied (*see Exec. Jet Aviation*, 409 US at 268). However, the status test is not satisfied because plaintiff's activity on defendant's vessel bore no cognizable relationship to maritime activity or commerce. As a result, section 905 (b) cannot apply to preempt plaintiff's state law claims against the vessel owner (*see e.g. McLaurin*, 529 F3d at 291-292).

Plaintiff was employed by third-party defendant Elliot as a millwright to perform substantial mechanical work on gas turbine electrical generating units owned by defendant/third party plaintiff. These generating units happened to be housed on defendant's barges, i.e., vessels; however, other than their incidental location upon navigable waters, no other features of the gas turbine electrical generating units—nor of plaintiff's employment working on those units—bore any relation to a traditional maritime activity or to maritime commerce (*see Jerome B. Grubart, Inc.*, 513 US at 534). Indeed, the gas turbines are part of a power-generating operation that includes land-based structures adjacent

---

543 US at 485). The plaintiff had been hired by the dredge's owner "to maintain the mechanical systems" of the dredge (*id.*). The Supreme Court observed that the "question in th[e] case [was] whether a dredge is a 'vessel' under § 2 (3) (G) of the Longshore and Harbor Workers' Compensation Act" (*id.* at 484). Notably, after answering that narrow question, the Court remitted the matter for further proceedings.

to the barge turbines. Electricity generated by the barge turbines are conveyed over power lines, which are land-based, for transmission to energy consumers.

In *Matter of Consolidated Edison of New York, Inc. v City of New York* (44 NY2d 536 [1978]), we determined that, for the purposes of taxation, the barges were properly "classified as structures affixed to the land on which is situated the land-based distribution system to which [the barges] are physically connected and integrally related," and, as such, could be taxed as real property rather than personal property (*id.* at 542). A structure so entwined with a land-based energy production operation that we saw fit to permit its taxation as real property plainly has no relation to any traditional maritime activity.[4]

---

[4] While *Cammon v City of New York* does not form the basis for this dissent, the majority is mistaken to reject that case out of hand as distinguishable. To be sure, *Cammon* involved an action by an employee against a property owner—but so does this case. During an earlier hearing to determine plaintiff's eligibility for LHWCA workers' compensation benefits, the testimony of Astoria/Orion's asset manager, Liam Baker, indicated that, at a minimum, Astoria/Orion owned the electrical lines connecting the barges to Consolidated Edison's substation, and implied that Astoria/Orion owned the piers to which the barges were moored. Moreover, notably, when asked to describe the distance between Consolidated Edison's substation and Astoria/Orion's generating barges, Baker

That plaintiff recovered workers' compensation benefits under the LHWCA is of no import, inasmuch as the question whether plaintiff can recover no-fault benefits under the act is distinct from the question whether he can recover in maritime tort for vessel negligence under section 905 (b). Significantly, section 933 (a) of the LHWCA expressly recognizes that an employee covered by the LHWCA may have state law remedies against third parties other than his or her employer (*see McLaurin*, 529 F3d at 292). As the United States Court of Appeals for the Fifth Circuit explained in *McLaurin*,

---

observed that substation abutted the "property line" of Astoria/Orion, approximately 100 yards from the barges. Thus, here, plaintiff was injured while working on a barge attached to Astoria/Orion's land, and, as noted, we have already determined—albeit for tax purposes—that the barges are taxable as real property. In short, plaintiff was injured while working on the vessel portion of Astoria/Orion's integrated power generating station. In my view, the holding of *Cammon* would apply with equal force here, and bears repeating: "State application of strict liability here will not 'unduly interfere [] with the federal interest in maintaining the free flow of maritime commerce' . . . Local regulations that do not affect vessel operations, but rather govern liability with respect to landowners and contractors within the State, have no extraterritorial effect." (95 NY2d at 589, citing *American Dredging Co. v Miller*, 510 US 443, 458 [1994] [Souter, J., concurring]).

Appendix A

> "[s]ection 933 specifically forbids a claim against the employer or a person in his employ, leaving [section] 904 [workers' compensation claims] as the only avenue of recovery against the employer or a negligent coworker Notably, unlike employers, vessel owners are not mentioned in [section] 933, so a maritime worker may attempt to recover against a vessel owner for vessel negligence under (section] 905 (b) (or] against a vessel owner as a third-party tort feasor under (section] 933"

(529 F3d at 292, quoting 33 USC § 933 (quotation marks and original alterations omitted]).

The plain language of section 905 (b) makes recovery under that section the "exclusive remedy" where an injured employee has a cause of action for vessel negligence (33 USC 905 [b]). However, where, as here, the injured employee has no cause of action for vessel negligence under maritime law, section 933 of the LHWCA expressly recognizes and preserves state law causes of actions against third parties, including vessel owners who are not also employers.

Accordingly, I would affirm the order of the Appellate Division reinstating plaintiff's Labor Law claims against the owner of the barges, Astoria-Orion, and granting plaintiff partial summary judgment on the 240 (1) claim.

Appendix A

Order reversed, with costs, order of Supreme Court, New York County; reinstated and certified question answered in the negative. Opinion by Judge Jones. Judges Graffeo, Read, Smith and Pigott concur. Judge Ciparick dissents and votes to affirm in an opinion in which Chief Judge Lippman concurs.

* * *

Decided: November 23, 2009

APPENDIX B — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED AUGUST 12, 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Angela M. Mazzarelli, J.P.
David B. Saxe
David Friedman
James M. Catterson
Rolando T. Acosta, JJ.

2733
Index 400173/04
590721/04

James D. Lee,

Plaintiff-Appellant,

-against-

Astoria Generating Company, L.P., et al.,

Defendants-Respondents.

Astoria Generating Company, L.P., et al.,

Third-Party Plaintiffs-Respondents,

-against-

Elliott Turbomachinery Co., Inc., et al.,

Third-Party Defendants-Respondents.

Appendix B

ACOSTA, J.

The issue in this case is whether the barge containing an electricity generating turbine upon which plaintiff was working when he was injured is a "vessel" under the Longshore and Harbor Workers' Compensation Act (LHWCA, 33 USC § 901), thereby precluding plaintiff from pursuing an action ultimately against defendants (collectively Astoria), the owners of the barge, other than for negligence. We hold that the barge was not a vessel, and therefore, plaintiff's Labor Law § 240(1) and § 241(6) claims against Astoria are not precluded by the LHWCA. Alternatively, we hold that even if the barge were a vessel, federal maritime jurisdiction would not preempt these claims in any event.

On April 16, 2001, plaintiff, an employee of Elliott Turbomachinery, Co., Inc. and Elliott Company (collectively Elliott), injured his back while performing work as a millwright at the Gowanus Gas Turbines electric generation facility in Brooklyn, a facility that is owned and operated by Astoria.

The Gowanus facility is an electrical power generating station consisting of land-based structures as well as four barges, each of which houses eight gas turbine electrical generating units *(see Matter of Consolidated Edison Co. of N.Y. v City of New York*, 44 NY2d 536 [1978]). The mechanical parts of these turbines move inside cylindrical steel turbine "shells." The shells are housed within steel box-like enclosures called "exhaust wells," which are affixed to the deck of the barges. The side walls to the exhaust wells are

approximately fifteen feet high. Access hatches, known as "stack hatches" or "sniffers" are located on top of the exhaust wells. The distance from the stack hatch opening in the top of the exhaust well down to the top of the steel shell inside is about six to eight feet. The primary purpose of a stack hatch or sniffer is to do visual inspection from above and for gas detection; it was not designed for entry to perform major work.

The barges are connected to the power grid and are ready to produce electricity. They are moved to a drydock for periodic maintenance, which is generally done approximately once a decade. They are capable of being moved for the purpose of providing electric power at other locations. Barge No. 1, the barge where plaintiff was injured, as well as one of the other barges, were moved to Astoria, Queens in 1996 so that its generators could provide electric power following a fire at a generating station there that left the area without sufficient power. Although the barges were returned to their present location approximately three months later, they can be moved if the need arises.

Third party defendant Elliott is a corporation based in Pennsylvania that overhauls and maintains steam turbines used for the generation of electric power. Elliott entered into a contract with Astoria/Orion to perform an overhaul of the turbines. According to Joseph Vasquez, the general manager of the facility, the turbines were undergoing a "major overhaul" rather than normal maintenance, but not because of any kind of damage in particular (R. 348).

Appendix B

Elliott's work involved disassembling the entire turbine, shipping parts of it back to its shop in Pennsylvania for restoration or replacement, and returning it to the site. There, Elliott's millwrights reassembled the turbines.

On the day of the accident, Plaintiff was working on a turbine on barge number one. He was ordered by his supervisor to enter the turbine's exhaust well through the stack hatch to weld some fixtures inside. Plaintiff used a long metal extension ladder to get to the top of the exhaust well. He then entered the hatch opening by grasping its sides and lowering his body, feet first, down to the top of the steel cylindrical turbine shell. From there, he was to climb down to the base of the exhaust well, but his feet slipped out from under him and he fell eight feet to the base of the exhaust well, injuring his back. There is no indication in the record that plaintiff was provided a ladder for use inside the well, a safety harness or any other type of safety device.

The normal means of entry into an exhaust well was through a hole cut with an acetylene torch into the exhaust well's steel side walls. Earlier in the renovation such a hole had been cut, but the day before the accident, the side panel had been welded back onto the unit despite the fact that the welding job to which plaintiff had been assigned was not completed.

As a result of the accident, plaintiff was awarded benefits under LHWCA because he was injured on "navigable" waters. The LHWCA

Appendix B

"establishes a comprehensive federal workers' compensation program that provides longshoremen [and harbor workers] and their families with medical, disability, and survivor benefits for work-related injuries and death" *(Howlett v Birkdale Shipping Co.*, 512 US 92, 96 [1964]; 33 USC § 903), regardless of fault. This statute provides that workers who receive no-fault workers' compensation payments from their employers for injuries sustained in the course of their employment are precluded from seeking any other remedy against their employers (33 USC § 905[a]; *Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 51 [2004]).

An injured worker may bring an action against a third-party owner of the vessel without losing his or her worker-compensation rights *(Howlett*, 512 US at 96; *see Emanuel*, 10 AD3d at 51). However, the nature of the action against the owner depends on whether the craft upon which the employee was working was a vessel. If the craft is a vessel, 33 USC 905(b) generally limits recovery under maritime law to the third-party owner's own negligence only *(see Scindia Steam Navigation Co. v De Los Santos*, 451 US 156 [1981]).

The legislative history of the LHWCA is very clear as to why this is so. As enacted, the employer's compensation for liability under LHWCA was to be exclusive. Section 933(a) of LHWCA provided that if a third party was liable in damages for the employee's injuries, the employee could recover against the third party. Nineteen years after the enactment of LHWCA, the Supreme Court held, in *Seas Shipping Co. v Sieracki* (328 US 85 [1946]), that a

longshoreman could recover from a third-party shipowner for the vessel's unseaworthiness (a claim based on strict liability for the stevedoring company's negligence). The Court then held in *Ryan Stevedoring Co. v Pan-Atlantic S.S. Corp.* (350 US 124 [1956]), that the shipowner could recover full indemnity for any amount paid on the *Sieracki* claim because of an implied warranty of workmanlike service running from the stevedore employer to the shipowner *(see* Force and Norris The Law of Maritime Personal Injuries [5th ed], § 8:13). Thus, the *Sieracki-Ryan* rule effectively eliminated the "exclusive and in place of all liability" provision of the LHWCA *(id.)*. Concerned over this development, the stevedore's insurance companies appealed to Congress. Noting that "*vessels* by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries" (HR Rep 92-1441, 1972 US Code Cong & Admin News 4698, 4704, emphasis added), Congress overruled the *Sieracki-Ryan* rule for "vessels" with the 1972 addition of § 905(b) .

A vessel is "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" *(Stewart v Dutra Constr. Co.,* 543 US 481, 497 [2005]). Notwithstanding this expansive definition, not all watercraft are vessels. In determining whether a structure qualifies as a vessel, it is necessary to examine the structure's purpose and the business in which it is engaged (see *Pavone v Mississippi Riverboat Amusement Corp.,* 52 F.3d 560, 570 [5th Cir

1995]). *Pavone* held that a floating casino did not constitute a vessel where the casino was moored "in a semi-permanent or indefinite manner" (*id.* at 570). The Fifth Circuit's decision was based in large part on the fact that the barge had never been used as a seagoing vessel to transport cargo, passengers or equipment, as well as the barge's substantial dockside attachment to land. Furthermore, the purpose of the barge was a land based enterprise (casino), and it was not engaged in maritime commerce.

A decade after *Pavone,* the United States Supreme Court addressed the issue of whether a dredge is a vessel under LHWCA in *Stewart v Dutra Constr. Co.* (543 US 481, supra). Citing *Pavone,* the Court noted that while a structure's use or capability of use as a means of transportation is a major factor in considering whether a craft is a vessel, the inquiry does not end there. Rather, as a practical matter, when a ship is permanently moored or otherwise rendered incapable of movement, the craft will not be considered a vessel for maritime law purposes (*id.* at 494).

If the craft is not a vessel, neither the express language of LHWCA nor its legislative history prevents plaintiff from pursuing a New York Labor Law claim against the third-party owner of the craft, even if the claims are base on strict liability. The LHWCA "preserves to covered employees any remedy that otherwise exists against third parties, including those that arise under state law" (Force and Norris, § 8:1). "If on account of a disability or death for which compensation is payable under this chapter

the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, *he need not elect whether to receive such compensation or* to *recover damages against such third person* (33 USC § 933 [a], emphasis added).[1] Congress's concern over a vessel's superior economic strength relative to stevedores by forcing the latter to indemnify the owners simply does not apply to circumstances where the craft is not a vessel.

Here, plaintiff asserted state labor law claims (Labor Law § 200, § 240[1] and § 241[6]) against Astoria, the owner of the barge, for his injuries. Astoria subsequently filed a third-party complaint against Elliott seeking indemnification.

---

[1] A covered employee can still sue nonvessel-owner third parties under general maritime law tort principles (Cheavens, Terminal Workers' Injury and Death Claims, 64 Tulane L Rev, 361, 364 [1989], citing *Melerine v. Avondale Shipyards*, 659 F.2d 706, 708 [5th Cir 1981] and *Harrison v Flota Mercante Grancolombiana, S.A.*, 577 F2d 968, 977 [5th Cir 1978]. In *Chandris, Inc v Latsis* (515 US 347, 356 [1995]), the Supreme Court cited Cheavens in noting that injured workers such as a vessel's crew members, who are covered employee under LHWCA, "may still recover under an applicable state workers' compensation scheme or, in admiralty, under general maritime tort principles."

Appendix B

Citing LHWCA (33 USC § 905[a])[2], Elliott moved for summary judgment dismissing the complaint and the third-party complaint, arguing, inter alia, that it is immune from suit under federal law and that plaintiff's claims were preempted by federal maritime law. Astoria cross-moved for summary judgment, also arguing that plaintiff's claims were preempted and that, in any event, plaintiff failed to state a claim against it under the Labor Law. In the alternative, Astoria sought summary judgment granting it a defense and conditional indemnification from Elliott based on what it maintained was an indemnification provision contained in the contract between them.

---

[2] Section 905(a) provides in relevant part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death.

Appendix B

Plaintiff opposed the motions, arguing that his Labor Law claims were not preempted by federal law because the barge upon which he was injured is not a "vessel" as that term has been defined *(see Stewart v Dutra Constr. Co.*, 543 US 481, *supra; Pavone v Mississippi Riverboat Amusement Corp.*, 52 F3d 560, *supra),* inasmuch as it is permanently anchored, is connected to city utilities, lacks propulsion equipment, does not serve a transportation function, and was built as an extension of a land-based activity. Therefore, he maintains substantive maritime law does not apply.

The court granted the motions and dismissed the complaint primarily on its holding that the barge was a vessel and thus the action was subject to maritime law.

Contrary to the motion court, we hold that the structure in question is not a "vessel." An overview of the physical characteristics as well as the purpose of the Gowanus Gas Turbine Generating Station all lead to the conclusion that the powerer barge upon which plaintiff was injured is not a vessel.

The barges on the Gowanus site, which undeniably float, are nonetheless attached to piers at the facility by way of spud beam clamping systems, which allow the barges to rise and fall with the tide. The barges are connected to New York City water pipes, and the electrical power lines of the barges run to the Con Ed substation that abuts the property. Their only movement over water is to a drydock for periodic maintenance, which is done approximately once a decade. The barges arrived at the site in about

1969, and Astoria maintains it has no intention to move any of the barges for any reason other than periodic maintenance *(see Kathriner v Unnisea, Inc.*, 975 F2d 657 [9th Cir 1992]). The electricity created at the facility is conveyed over Astoria's and Con Ed's power line transmission system to Con Ed's nearby Brooklyn and Queens customers.

Moreover, the turbine facility, whose sole purpose is to provide electrical power to these neighborhoods, is permanently moored, serves no ancillary maritime purpose, and was not intended to operate as a vessel in navigation. The facility receives its utilities from shore, and as noted, provides power via lines that run from the barge to the Con Ed substation. The facility is not self-propelled, and was designed and intended to be a power plant, not a means of water transportation or maritime commerce *(see De La Rosa v St. Charles Gaming Co.*, 474 F3d 185 [5th Cir 2006] [Boat not a vessel where its intended use was as an indefinitely moored floating casino]). Indeed, in *Matter of Consolidated Edison Co. of N.Y. v City of New York* (44 NY2d 536 [1978]), decided prior to Astoria's purchase of the facility, the Court of Appeals found that these very barges were the functional equivalent of land-based structures, and taxation of them as realty, not personalty, was proper. Moreover, electricity from the turbines can only be produced with the communication, remote start, fire protection, fuel, water, and power lines connected to the Con Ed substation, a land-based structure. The barge's attachments to Con Ed's land-based substation render the barge's capability to move

theoretical rather than practical (*Stewart*, 543 US at 494).

Inasmuch as plaintiff's action against Astoria is not governed by maritime law, his claims are subject to New York State's Labor Law (*Florida Fuels v Citgo Petroleum Corp.*, 6 F3d [330, 332 5th Cir 1993]; *Holland v Sea-Land Serv.*, 655 F2d 556, 559 4th Cir 1981]; *see generally Victory Carriers v Law*, 404 US 202 [1971]). The dismissal of plaintiff's § 240(1) and § 241(6) claims were thus not warranted under maritime law principles.[3] Accordingly, upon a search of the record, this Court holds that plaintiff established its entitlement to partial summary judgment as to liability on his § 240(1) claim.

Labor Law § 240(1) creates a nondelegable duty upon property owners to provide safety equipment to protect workers against falling from a height. Under this provision, plaintiff does not have to show that Astoria had actual supervision or control over the work he was performing in order for liability to be found (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-501 [1993]). That plaintiff was working on a turbine rather than a building is of no moment, inasmuch § 240(1) applies to all structures (*see e.g. Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]; *Mosher v State of New York*, 80 NY2d 286 [1992]; *Lombardi v Stout*, 80 NY2d 290 [1992]).

---

[3] Astoria did not appeal the portion of the order that dismissed its third-party complaint since it was not aggrieved by the court's order dismissing plaintiff's action in its entirety.

Appendix B

Here, plaintiff was not given the proper equipment to lower himself approximately 15 feet to the base of the exhaust well to weld fixtures inside. The absence of proper safety equipment caused plaintiff's fall and injury. Accordingly, plaintiff established his prima facie entitlement to summary judgment, and the burden thus shifted to Astoria to raise triable issues of fact, which it failed to do. Notwithstanding Astoria's assertions to the contrary, there is no indication in the record that plaintiff's actions were the sole proximate cause of his injuries (*see Montalvo v Petrocelli Constr., Inc.*, 8 AD3d 173, 175 [2004]. Just to work on these turbines, a hole had to be cut out on the side of the half-inch thick walls of the wells. Indeed, the panel that had been cut out of the side of the exhaust well to allow the workers' entry was welded back in place the day prior to plaintiff's injury. Furthermore, there was testimony that plaintiff complained but was essentially told that if he did not enter the well through the hatch at the top, he could pack his tools and go home.

Nor was plaintiff engaged in routine maintenance (*Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 543-544 [2004] [where the work included removal and replacement of a bulwark, reconditioning wheels and shafts, installing new fendering, engine overhaul, painting and zincs, tank cleaning, and installing new deck winches, all of which was expected to take several weeks to complete]). In examining the totality of the work done on the project, the overhaul of the turbines resulted in a significant physical change to the turbine, rather than simple, routine

activity that would fall outside the scope of the statute (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003] [actively inspecting an air conditioning fan that was being overhauled]; *Joblon v Solow*, 91 NY2d 457, 465 [1998] [extending wiring within a utility room and chiseling a hole through a concrete wall]); *Velasco v Green-Wood Cemetery*, 8 AD3d 88 [2004] [replacing loose and broken slate roof tiles, cleaning gutters, installing new flashing cement and copper flashing, and repairing a roof leak]; *Mannes v Kamber Mgt.*, 284 AD2d 310 [2001] [hanging pipes from ceiling and extending them through a wall to an adjacent structure]).

This job lasted several months, with parts having to be shipped to Pennsylvania for restoration or replacement. There was nothing routine about this work (*cf. Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]), other than the fact that a total mechanical overhaul was performed on the massive turbines on a relatively periodic basis.

The motion court also did not analyze the facts of this case under Labor Law § 241(6) with regard to plaintiff's claim that defendants violated the Industrial Code as it applies to vertical passages.[4]

---

[4] 12 NYCRR 23-1.7(f) provides that "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their

Given that plaintiff had to climb approximately 15 feet to get to the access hatch on top of the turbine's exhaust well, and then lower himself through the hatch onto the top of the turbine shell and down to the base of the exhaust well, during which he fell approximately 8 feet, there is, at the very least, a question of fact regarding whether this section of the Industrial Code precludes an award of summary judgment to defendants. Plaintiff's description of how he had to access the work area, provides evidence that is contrary to defendants' assertion that the area was at ground level, which would render this section inapplicable.

The court was correct, however, in finding that Astoria did not have supervisory control over the injury-producing activity necessary to support a finding of liability for common-law negligence or under Labor Law § 200 (*Balbuena v New York Stock Exch., Inc.* 45 AD3d 279, 280 [2007]).

Inasmuch as maritime law is not applicable in this action, the court should not have dismissed Astoria's third-party claims for defense and indemnification without analyzing those claims under applicable state law (see *Pennisi v Standard Fruit & S.S. Co.*, 206 AD2d 290 [1994]). As Astoria did not appeal from the dismissal of its third-party claims, however, we are barred under these circumstances from granting relief to a nonappealing party (see

---

installation in which case ladders or other safe means of access shall be provided."

Hecht v City of New York, 60 NY2d 57 [1983]).

As an alternative holding, even assuming that the barge in question was a vessel, we nonetheless hold that New York's Labor Law is not preempted by Federal maritime jurisdiction. "The fact that Federal maritime law is involved does not necessarily mean that State law is superseded" (*Cammon v City of New York*, 95 NY2d 583, 587 [2000]). Rather, "[i]n assessing whether the State rule is preempted, a number of factors may be considered, including whether the State rule conflicts with Federal law, hinders uniformity, makes substantive changes, or interferes with the characteristic features of maritime law or commerce" (*id.* at 588).

In analyzing these factors in a factual pattern remarkably similar to those in the instant case, the Court of Appeals in *Cammon* held that Federal maritime law did not preempt New York's Labor Law. The plaintiff in *Cammon*, who was in the process of repairing a pier, was injured while working on a float stage in navigable waters that was secured to a land-based transfer station. In his complaint, he alleged violations of Labor Law § 200, § 240 and § 241. The Court relied heavily on the "maritime but local" rule, which allows for the application of state rules "as to certain local matters regulation of which would work no material prejudice to the general maritime law" (*Grant Smith-Porter Ship Co. v Rohde*, 257 US 469, 477 (1922)). Noting that the objective of Federal maritime law was to protect workers engaged in maritime activities, the Court of Appeals held that

applying New York's Labor Law to the facts presented in *Cammon* was "unlikely to disrupt Federal maritime activity" since it would not "unduly interfere [] with the federal interest in maintaining the free flow of maritime commerce" *(id.* at 589, citing Justice Souter's concurring language in *American Dredging Co. v Miller*, 510 US 443, 458 (1994)). "Local regulations that do not affect vessel operations, but rather govern liability issues with respect to landowners and contractors within the State, have no extraterritorial effect" *(Cammon*, 95 NY2d at 589).

This is especially so when the health and safety of workers is involved. "Protecting workers employed in the state is within the historic police powers of the State and there is no 'clear and manifest' congressional intent to preempt this state prerogative" *(Gravatt v City of New York*, 1998 US Dist LEXIS 4886, *32, 1998 WL 171491, *12 [SD NY]). Moreover, strict liability statutes, such as Labor Law § 240(1), are not necessarily inconsistent with federal maritime law *(Gravatt*, 1998 US Dist Lexis 4886, *37, 1998 WL 171491, *14).

The dissent's insistence to the contrary, *Cammon* is not limited solely to claims against landowners. Although the Court there relied on New York City's landlord status, its decision was based on the activity's impact on traditional maritime commerce. We also reject the argument that Labor Law § 240(1)'s strict liability standard conflicts with federal maritime law and should be preempted. This is especially true where, as here, "the tort was maritime

but local and there are no far-reaching implications for vessels, seafarers or entities engaged in maritime commercial transactions, there is no threat to the uniformity of the Federal maritime law sufficient to displace application of an important State health and safety measure, even though it may impose strict liability" (*Cammon*, 95 NY2d at 590).

Nor does our holding in *Emanuel*, where the § 240 claim was properly dismissed as in conflict with maritime law, dictate an inconsonant result. *Emanuel* was a rigger on an oil/transport barge (a vessel) whose cargo was discharged so that permanent repairs could be made before resuming operation. Here, as noted, plaintiff was injured on a barge connected to a land-based structure which provided a land-based service, namely electric power.

Accordingly, the order of Supreme Court, New York County (Carol Edmead, J.), entered on or about January 23, 2007, which insofar as appealed from, granted motions by defendants, the barge's owners, and by third-party defendants, plaintiff's employers, for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the motions denied, plaintiff's claims pursuant to Labor Law § 240(1) and § 241(6) reinstated, and plaintiff granted partial summary judgment as to liability on his 240(1) claim.

All concur except Friedman, J. who dissents in part in an Opinion.

Appendix B

FRIEDMAN, J. (dissenting in part)

In *Stewart v Dutra Constr. Co.* (543 US 481 [2005]), the United States Supreme Court held that the term "vessel" in the Longshore and Harbor Workers' Compensation Act (LHWCA, or "the Act") (33 USC §§ 901-950) is broadly defined to "include [] every description of watercraft . . . used, or capable of being used, as a means of transportation on water" (1 USC § 3). The majority, in determining that the barge on which plaintiff was injured is not a "vessel" under the LHWCA, looks for primary guidance, not to *Stewart*, but to a readily distinguishable Fifth Circuit case decided ten years earlier. It seems to me that our primary guide in deciding this appeal should be *Stewart* and its progeny, and the clear weight of authority since *Stewart* supports holding the barge at issue to constitute a "vessel" under the LHWCA.

Moreover, the LHWCA provides that a negligence action against a vessel owner is the "remedy . . . exclusive of all other remedies against the vessel" for injuries covered by the Act (33 USC § 905[b]). The defendants in this action are the entities that owned and operated the barge on which plaintiff was injured. Contrary to the majority's contention that this action may go forward even if plaintiff was injured on a "vessel," the United States Supreme Court has recognized that § 905(b) expressly preempts causes of action against a vessel owner on grounds other than negligence, such as plaintiff's claims seeking to hold defendants vicariously liable under state law. The Court of Appeals decision on which the majority relies, *Cammon v City of New*

York (95 NY2d 583 [2000]), is not to the contrary, as it dealt with a claim against a landowner, not a vessel owner. Accordingly, I respectfully dissent to the extent the majority modifies to reinstate the causes of action under Labor Law § 240(1) and § 241(6), which, as applied to the defendants in this action, are not premised on such defendants' negligence, but on their alleged vicarious liability as owners of the barge. I believe that the order appealed from, which rendered summary judgment dismissing the complaint in its entirety, should simply be affirmed.[1]

Plaintiff, a millwright, injured himself in the course of overhauling a power-generating turbine on a barge moored in the Gowanus Canal in Brooklyn. The barge was part of the Gowanus Power Generating Facility (the Gowanus facility), a group of turbine-bearing barges owned and operated by defendants Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC (collectively, Astoria/Orion). At the time of his injury, plaintiff was working in the employ of third-party defendants Elliott Turbomachinery Co., Inc. and Elliott Company (collectively, Elliott).

In administrative proceedings before the United States Department of Labor, plaintiff

---

[1] Given the absence of any evidence of negligence by defendants, I concur in the affirmance of the dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action.

prevailed on his claim against Elliott to recover statutory benefits under LHWCA. In this action, plaintiff sues Astoria/Orion, the owner and operator of the Gowanus facility, to recover damages based on the same incident, asserting causes of action under Labor Law § 240(1) and § 241(6). Plaintiff adduced no evidence that any negligence of Astoria/Orion itself contributed to the causation of his accident.

I begin with a review of relevant aspects of the LHWCA, which "provides workers' compensation to land-based maritime employees" *(Stewart,* 543 US at 488 [emphasis omitted]).[2] The LHWCA provides for a covered employee's right to compensation from his or her employer for a work-related injury (33 USC §

---

[2] The LHWCA applies (subject to exceptions not pertinent here) to claims for "disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)" (33 USC 903[a]). For purposes of the LHWCA, the term "employee" is defined to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," subject to certain exceptions (including one for "a master or member of a crew of any vessel") not pertinent here (33 USC 902[3]).

904[a]), "irrespective of fault as a cause for the injury" (33 USC § 904[b]), and provides that such compensation is the exclusive remedy against the employer available to the employee (33 USC § 905 [a]). In addition, § 905(b) of the LHWCA provides that a covered worker whose injury was "caused by the negligence of a vessel . . . may bring an action against such vessel" to recover damages for its negligence, and that such a negligence action is the worker's "exclusive" remedy "against the vessel" (33 USC § 905[b]).[3] The United States Supreme Court has

---

[3] In pertinent part, 33 USC 905(b) provides:

"(b) Negligence of vessel

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

recognized that, in amending the LHWCA to add subsection (b) to § 905, "Congress' intent . . . [was] to eliminate the vessel's nondelegable duty [under prior law] to protect longshoremen from the negligence of others" (*Howlett v Birkdale Shipping Co., S.A.*, 512 US 92, 104 [1994], citing *Scindia Steam Nav. Co. v De Los Santos*, 451 US 156, 168-169 [1981]; *see also id.*, 451 US at 172 [§ 905(b) "reject(s) the notion of a nondelegable duty on the shipowner to provide a safe place to work"]; *id.* ["(T)he congressional intent (was) to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty"]). Thus, 33 USC § 905(b) "make[s] the vessel answerable [only] for its own negligence" (*id.* at 168).

Since plaintiff has prevailed on his claim for LHWCA benefits against his employer (Elliott), there can be no dispute that claims arising from the injuries he incurred in the subject incident fall within the scope of the LHWCA. Further, given the aforementioned absence of evidence that plaintiff's injuries were caused by any negligent conduct by Astoria/Orion itself, the causes of action asserted against Astoria/Orion under Labor Law § 240(1) and § 241(6) are necessarily predicated on an owner's nondelegable duty under those statutes to see that the statutory requirements are complied with at the work

---

It should be noted that, as used in the LHWCA, the term "vessel" includes "said vessel's owner, operator, master, officer, or crew member," inter alia (33 USC § 902[21]).

site.[4] Thus, to the extent the barge on which the accident occurred vias a "vessel" within the meaning of the LHWCA, holding Astoria/Orion vicariously liable for a violation of Labor Law § 240(1) or § 241(6) poses a stark conflict with the exclusivity provision of 33 USC § 905(b), which, to reiterate, immunizes the owner of a "vessel" from liability to a covered worker on the basis of any theory of nondelegable duty *(see Scindia Steam*, 451 US at 172 [§ 905(b) "foreclose(s) the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty"]). For the reasons discussed below, it is my view that the barge in question does constitute a "vessel" under the LHWCA, and, therefore, plaintiff's causes of action under Labor Law § 240(1) and § 241(6) are preempted pursuant to the Supremacy Clause of the United States constitution.

Since the LHWCA does not define the distinguishing characteristics of a vessel, the Supreme Court has held that a definition of the term set forth elsewhere in the United States Code applies to the Act *(see Stewart*, 543 US at 490).[5] That definition—as

---

[4] The record establishes that plaintiff was working under the sole direction, supervision and control of Elliott, his employer, and contains no evidence of any negligence on the part of Astoria/Orion that may have been causally related to the accident. Given its affirmance of the dismissal of the negligence and Labor Law § 200 claims against Astoria/Orion, the majority apparently agrees with me on this point.

[5] As the Supreme Court noted, although the

previously noted, an exceedingly broad one—is as follows: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (1 USC § 3).

In discussing the statutory definition of "vessel," the Supreme Court observed that "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement" (543 US at 494). The Court further noted:

> "Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." (*Id.* at 495).

Moreover, "a watercraft need not be in motion to qualify as a vessel under § 3" *(id.)*. While acknowledging that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time," the Court explained that "a structure's locomotion at any given

---

LHWCA does contain a definition of the term "vessel" (33 USC § 902[21]), that definition, "[r]ather than specifying the characteristics of a vessel, . . . instead lists the parties liable for the negligent operation of a vessel" (*Stewart*, 543 US at 489 n 2).

moment" does not determine whether it has vessel status (*id.* at 496). The Court elaborated:

> "A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. *The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is* a *practical possibility* or *merely* a *theoretical one.*" (*Id.* [emphasis added]).

In sum, under *Stewart*, a "vessel" for purposes of the LHWCA "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment," and "[d]espite [any] seeming incongruity of grouping [the craft] alongside more traditional seafaring vessels" (543 US at 497). Applying this standard in *Stewart*, the Supreme Court held that a massive dredge, which "moved long distances by tugboat" and "short distances by manipulating its anchors and cables" (*id.* at 484), was a vessel for purposes of the LHWCA. In subsequent decisions, watercraft that have been held to qualify as vessels under the *Stewart* standard include: a moored dormitory barge that had no means of self-propulsion and was towed by tug between project locations (*Holmes v Atlantic Sounding Co., Inc.*, 437 F3d 441 [5th Cir 2006]); a cleaning barge that had no means of self-propulsion and was moored to a riverbed (*Bunch v Canton Mar. Towing Co., Inc.*, 419 F3d 868 [8th Cir 2005]); a dredge similar to the one in *Stewart* (*Uzdavines v*

Weeks Mar., Inc., 418 F3d 138 [2d Cir 2005]); a construction barge used in the installation of an underwater sewer main (*Calcaterra v City of New York*, 45 AD3d 270 [2007]); riverboat casino that was released from its moorings only for maintenance, namely, to be spun around to dislodge accumulated drift material (*Booten v Argosy Gaming Co.*, 364 Ill App 3d 697, 848 NE2d 141 [2006], *appeal denied* 221 Ill 2d 632, 857 NE2d 669 [2006]); and two riverboat casinos that were moored to shore at all times except for 200 hours of cruising per year mandated by state gaming laws (*Harvey's Casino v Isenhour*, 713 NW2d 247 [Iowa App 2006], *affd* 724 NW2d 705 [Iowa 2006], *cert denied* ___US___ 127 S Ct 2943 [2007]).

Contrary to the majority's position, the power-generating barge on which plaintiff was injured qualifies as a "vessel" under *Stewart*, which, to reiterate, requires only that "the watercraft's use 'as a means of transportation on water' [be] a practical possibility," not "merely a theoretical one" (543 US at 496). In this case, the use of the subject barge as a means of transportation on water is plainly a practical possibility, as the barge is detached from its moorings and moved by tug to drydock for maintenance about once every 10 years. Moreover, the barge can be moved to provide power at other locations when necessary. In 1996, for example, the barge was moved to Astoria, Queens, to provide energy to that area after a fire at a generating station caused a power shortage there. After three months in Astoria, the barge was moved back to its home base in Gowanus. When the barge is moved, it serves to transport the

power turbines it supports to the trip's destination.

The foregoing facts establish that the subject barge is "practically capable of marine transportation" (*Stewart*, 543 US at 497). In the past, it has been detached from its moorings and moved to receive periodic maintenance. In addition, when needed, the barge has been moved to provide power at a location experiencing a temporary shortage and, thereafter, to be returned to Gowanus. In the future, it will again be moved to receive periodic maintenance, and it may well also be moved again to address temporary power shortages in other areas and then to return to Gowanus. Under *Stewart*, this suffices to render the barge a "vessel" for purposes of the LHWCA. It is of no moment that the barge's primary purpose is not transportation, that its movements are infrequent, or that it lacks means of self-propulsion. As the Eighth Circuit stated of a tow barge (the Rand) that was moored in the Mississippi River for use as a restaurant, bar and gas station:

> "The Rand was 'capable of use' as a vessel, albeit under tow. While it may have been inefficient or expensive to use the Rand as a vessel, those factors do not serve to strip the Rand of its vessel status. The Rand fits 'into the category of many other vessels with similarly limited capacities.' Although the Rand probably will never 'slip her moorings' and set off toward open waters, she is nonetheless a towable vessel capable of use as a means of transportation on

> water" (*United States v Templeton*, 378 F3d 845, 852 (8th Cir 2004) (holding that the Rand constituted a "vessel" under a statutory definition identical in substance to 1 USC § 3) (citations omitted).

In considering whether the subject barge constituted a "vessel" under the LHWCA, it should be borne in mind that the question on this appeal is not whether plaintiff's claim falls within the "maritime jurisdiction," an inquiry that would involve applying a two-part test of "location" and "connection with maritime activity" (*Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co.*, 513 US 527, 534 [1995]. Whether or not plaintiff's claim would fall within the maritime jurisdiction, his claim *does* fall within the scope of the LHWCA, which covers claims both within and without the maritime jurisdiction.[6] Since it is

---

[6] As previously noted, the LHWCA covers the "disability or death" of a covered employee "result[ing] from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*)" (33 USC § 903 [a] [emphasis added]). Thus, claims for injuries suffered on land and *not* caused by a vessel on navigable waters may be covered by the LHWCA, even though such claims fall outside the maritime jurisdiction (*see* 46 USC § 30101 [a] ["The admiralty and maritime jurisdiction of the United States extends to and includes

undisputed that the injury sued upon falls within the coverage of the LHWCA—indeed, plaintiff, having prevailed against his employer on his claim for LHWCA benefits, is estopped to assert otherwise—the only real question on this appeal is whether the barge on which the injury occurred qualifies as a "vessel" under the LHWCA, so as to render applicable to Astoria/Orion, the barge's owner, the immunity from liability without fault provided by 33 USC § 905(b).

As discussed above, it is my view that the power barge on which plaintiff was injured constituted a "vessel" for purposes of the LHWCA under the broad standard the Supreme Court established in *Stewart*.[7] The majority's conclusion to the contrary is not warranted by the authority it cites. *Pavone v Mississippi Riverboat Amusement Corp.* (52 F3d 560

---

cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land"]).

[7] Since plaintiff was not required to show that his injury occurred on a "vessel" to prevail on his claim for LHWCA benefits, he is not estopped to deny that the subject barge was a vessel. Nonetheless, it is noteworthy that, in the administrative proceedings on the claim for LHWCA benefits, his counsel specifically argued that plaintiff's work on the barge "subjected [him] to a certain element of danger which comes with working on the water"; that "the barge rocks and moves with wind and the tide"; and that plaintiff's work was "not land-based." Plaintiff's counsel even referred to the barge as a "vessel."

[5th Cir 1995]), the decision on which the majority places greatest emphasis, involved a moored riverboat casino that, unlike the barge here, "was joined to a shore-side building" (*id.* at 564). Moreover, there is no indication in the *Pavone* decision that the owner had any definite intention, once the riverboat was moored in its berth at the time of the subject incident, of moving the boat ever again (unless a weather emergency occurred), even for maintenance.[8] Here, by contrast, the owner plans to move the power barge to and from drydock for periodic maintenance while it remains in use. The Fifth Circuit's decision in *De La Rosa v St. Charles Gaming Co., Inc.* (474 F3d 185 [5th Cir 2006]), follows *Pavone*, and is distinguishable on the same grounds. Another case cited by the majority, *Kathriner v Unmisea, Inc.* (975 F2d 657 [9th Cir 1992]), is readily distinguishable on the ground that, as noted in *Stewart* (543 US at 494), a "large opening [had been] cut into [the] hull" of the subject structure (a floating processing plant), which rendered the structure incapable of travel over water (975 F2d at 660). Finally, *Matter of Consolidated Edison Co. of N.Y. v City of New York* (44 NY2d 536 [1978]) concerned the classification of the subject barge for purposes of its taxability by the City of New York under the Real Property Tax Law, and has no relevance to the question of whether the barge

---

[8] While *Pavone* is cited in *Stewart*, the Supreme Court cited the case, without discussing its facts in any detail, only for the statement that the riverboat casino there at issue was not a vessel because it "was moored to the shore in a semi-permanent or indefinite manner" (543 US at 494, quoting *Pavone*, 52 F3d at 570).

constituted a "vessel" under the LHWCA, as that federal statute has been construed by the Supreme Court.

For all of the reasons discussed above, the record establishes that (1) the LHWCA applies to plaintiff's claim, (2) the injury occurred aboard a "vessel" within the meaning of the LHWCA, and (3) the instant action is brought against the owner of that vessel. Thus, the only matter remaining for consideration is whether the exclusivity provision of § 905(b) of the LHWCA preempts plaintiff's causes of action under Labor Law § 240(1) and § 241(6). In my view, it plainly does. As noted above, the intent of Congress in enacting § 905(b) was specifically to exempt the owner of a vessel, in its capacity as such, from liability without fault, including liability based on any theory of nondelegable duty, for injuries befalling workers covered by the LHWCA. Indeed, since the congressional intent to eliminate the non-fault liability of vessel owners "is explicitly stated in the statute's language" (*Jones v Rath Packing Co.*, 430 US 519, 525 [1977]), this is an instance of express preemption, as the Supreme Court itself has recognized:

> "[The LHWCA) provides nonseaman maritime workers . . . with no-fault workers' compensation claims (against their employer, § 904[b]) and negligence claims (against the vessel, § 905[b]) for injury and death. *As to those two defendants, the LHWCA expressly preempts all other claims,* § 905(a), § (b)" (*Norfolk Shipbuilding & Drydock Corp.*

v Garris, 532 US 811, 818 [2001] [emphasis added]]).

Because we are dealing with a federal statute that directly applies to the situation at bar and conflicts with the state law remedies invoked by plaintiff, the flexible approach to application of state law in cases also generally subject to federal maritime law, as reflected in *Cammon* (95 NY2d 583 [2000], *supra*), is out of place. Although the injury in *Cammon* as covered by the LHWCA (under which the plaintiff received benefits), the suit in state court was against the City of New York based on its ownership of the South Bronx Marine Transfer Station, where the plaintiff was injured while making repairs to a pier from a "float stage" in the water (*id.* at 586). Thus, the prosecution of the *Cammon* claims against the City under Labor Law § 240(1) and § 241(6) did not present any conflict with the LHWCA, in general, or with § 905(b) thereof, in particular. Similarly, in *Olsen v James Miller Mar. Serv., Inc.* (16 AD3d 169 [2005]), in which we held that maritime law did not preempt the Labor Law claims of a plaintiff who fell through a hole in the deck of barge while engaged in the pier repair project, the only claims at issue on the appeal were those against Con Edison, as lessee of the pier, and Con Edison's general contractor (see *also Gravatt v City of New York*, 1998 WL 171491, *10-16 [SD NY 1998] [holding that Labor Law claims against City, as owner of a bridge, and Massand, an engineering firm, were not preempted, while denying motions to dismiss claims under 33 USC § 905(b) and the Jones Act against S & B, the employer and vessel

owner]). Neither *Cammon*, *Olsen* nor *Gravatt* addressed Labor Law claims against a party that would have fallen within the scope of the term "vessel" as used in the LHWCA (see 33 USC § 902 [21]).

On point is our decision in *Emanuel v Sheridan Transp. Corp.* (10 AD3d 46 [2004]), in which we held preempted a Labor Law § 240(1) cause of action brought by the administratrix of a shipyard worker against the owner and the operator of a vessel in drydock *(id.* at 58-59). The decedent in *Emanuel*, like plaintiff in this case, was covered by the LHWCA *(id.* at 52). The same result should follow here.

I close with the following observations. The majority holds in the first instance that plaintiff's Labor Law claims against Astoria/Orion are not barred because, in the majority's view, the barge on which plaintiff was injured was not a "vessel" within the meaning of the LHWCA. While I disagree with the majority on the question of whether the barge was a "vessel" (as discussed above), I agree with the majority that, if the barge were not a "vessel," the LHWCA would not preempt plaintiff's Labor Law claims. I have a more profound disagreement with the majority's alternative holding that, even if the barge was a "vessel" under the LHWCA (as I believe it was), the displacement of the federal statutory provision expressly barring this action can be justified by appeal to the flexible analysis used to determine the applicability of state law in situations also subject to the general federal maritime jurisdiction (see *Cammon*, 95 NY2d at 587-590). To reiterate, the majority's use of this sort of flexible analysis - which

the Court of Appeals quite properly employed in *Cammon*, where the defendant was *not* sued based on its ownership of a vessel --is altogether out of place here, where the defendant is a vessel owner that the LHWCA expressly immunizes from liability on grounds other than its own negligence. Whatever flexibility we may have in harmonizing federal and state interests in other contexts, we have no authority to refuse to apply a federal statute that, by its plain terms, expressly applies to the situation at bar. Nothing in *Cammon* remotely supports the majority's view that, even if the barge was a "vessel," we may permit this action to go forward notwithstanding the express bar of a duly enacted federal statute.

For all of the foregoing reasons, I respectfully dissent as to the reinstatement of the causes of action under Labor Law § 240(1) and § 241(6).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 12, 2008

CLERK

APPENDIX C — MEMORANDUM DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, PART 35 DATED JANUARY 12, 2007

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 35

Index No. 400173/2004

JAMES D. LEE,

Plaintiff,

-against-

ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., ORION POWER NEW YORK LP, LLC,

Defendants.

Third-Party Index No. 590721/2004

ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., ORION POWER NEW YORK LP, LLC,

Third-Party Plaintiffs,

-against-

ELLIOTT TURBOMACHINERY CO., INC. andELLIOTT COMPANY,

Third-Party Defendants.

Appendix C

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Before this Court is the motion of Third-Party Defendants Elliott Turbomachinery Co., Inc. and Elliott Company, former employer of Plaintiff James D. Lee, for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and the underlying complaint in its entirety. Also before this Court is a cross-motion by Third-Party Plaintiffs Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., Orion Power New York LP, LLC for summary judgment dismissing the underlying complaint, and granting summary judgment for common law and contractual defense and indemnification against third-party defendants. For the reasons that follow, the underlying complaint and third-party complaint are dismissed.

FACTUAL BACKGROUND

On April 16, 2001, James D. Lee ("Plaintiff") was injured while performing work as a millwright for Elliott Turbomachinery Co., Inc. (hereinafter "Elliott") at the Gowanus Gas Turbines (hereinafter the "Facility") located in Upper New York Bay adjacent to the intersection of 29th Street and 2nd Avenue in Brooklyn, New York. The Facility is owned and operated by Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC (hereinafter "Astoria/Orion"). The Facility is a peak

load electrical power generating station used during high-demand periods.

The site is comprised, in part, of four barges that are each 80 feet wide by 200 feet long that collectively house eight individual gas turbine generating units. The units are approximately 10 feet wide by 50 feet long. The barges, which were originally purchased by Consolidated Edison and arrived at the site in 1969, float in the navigable waters of the Gowanus Canal and are attached to a pier by way of a spud beam clamping system, which allows the barges to rise and fall with the tide. Additionally, electrical lines run from the adjacent land to the barges and transmit the electricity generated by the barge-mounted turbines to an adjacent substation that is owned by Consolidated Edison. Communication, remote start, and fire protection lines, as well as water supplied via the New York City water system, also run between the land and the barges. The barges can be disengaged from the pier and transported by tugboat to dry dock for maintenance and repair, or to other locations to supply electricity where needed.[1] The barge contains life rings and is only accessible by walking on a gang plank (Mtn. at ¶ 27).

Astoria/Orion hired Elliott to conduct a major overhaul of the turbines (Mtn. at ¶ 29). This involved

---

[1] In 1996, two of the barges were transported by water to Astoria, Queens to supply emergency power following an accident at the Astoria, Queens power generating station.

disassembling each turbine, shipping parts to Elliott's facility in Pennsylvania to either be restored or replaced, and then returning the parts to the Gowanus site for reassembly by Elliott's millwrights.

On the date of the accident, Plaintiff and his work partner, Steve Perry ("Perry"), were performing work on Turbine 2, located on Barge 1. According to Plaintiff, he was ordered to enter the turbine's exhaust well through the stack hatch in order to perform welding duties at the base of the well (Opp. at pg. 5-6; Lee Aff. ¶ 4), even though such entry is typically made by cutting an access hole in the side of the well (Opp. at pg. 5; Lee Aff. ¶ 4). Such an opening existed until the day before the accident (Opp. at pg. 6; Lee Aff. ¶ 4). The hatch is located approximately 15 feet above the base of the well, which sits on the deck of the barge. The distance from the hatch opening to the top of the turbine shell is approximately six to eight feet (Opp. at pg. 6; Lee Aff. ¶ 4).

According to Plaintiff, he entered the well through the hatch without a ladder, any fall protection, or any safety devices, despite expressing concern about the method as being unsafe, because he was told to or to "get [his] stuff and leave" (Opp. at pg. 7; Lee Tr. 39; Lee Aff. ¶ 5). After Plaintiff had lowered himself through the top of the hatch to the top of the turbine he slipped and fell eight feet to the base of the well, injuring his back (Opp. at pg. 8; Lee Aff. ¶ 4). Upon completing the welding duties Plaintiff climbed out of the exhaust well with the assistance of Perry. Thereafter, Plaintiff aggravated his back injury as he and Perry were closing the hatch (Mtn. ¶ 41). Upon

closing the hatch and climbing down the outside of the exhaust well Plaintiff left the jobsite and sought medical attention (Opp. at pg. 8; Lee Aff. ¶ 4).

Plaintiff filed a workers compensation claim with the United States Department of Labor against Elliott pursuant to the Longshore and Harbor Workers Compensation Act ("LHWCA") (33 U.S.C. § 901 et seq.), and has been receiving benefits under the LHWCA since 2002. An administrative law judge found that Plaintiff was injured during the course of his employment while on a navigable waterway and awarded him benefits under the LHWCA. This decision was affirmed by the Benefits Review Board ("BRB").

Plaintiff commenced the within action in June 2003 against Astoria/Orion allenging that his injuries were caused by violations of Labor Law §§ 200, 240(1), and 241(6).[2] Thereafter, Astoria/Orion impleaded Elliott, claiming it was entitled to common law and contractual indemnification. The instant motions ensued.

MOTIONS FOR SUMMARY RELIEF

Elliott seeks dismissal of the third-party complaint, arguing that as Plaintiff's employer, it is immune from suit under the LHWCA (33 U.S.C. § 905

---

[2] Plaintiff alleges that the injuries he sustained on the day of the accident aggravated conditions relating to pre-existing back injuries (Mtn. ¶ 42)

[a]), which is the exclusive remedy for maritime employees covered under the LHWCA. It is further argued that the LHWCA renders Elliott immune from claims for indemnity (33 U.S.C. § 905[b]) (Mtn. ¶ 5)[3] Thus, Elliott argues, the third-party complaint should be dismissed.

Elliott further argues that Plaintiff's action against Astoria/Orion should be dismissed because Plaintiffs (1) Labor Law § 240(1) claim is preempted by the LHWCA, 33 U.S.C. § 905[b];[4] (2) claims for both Labor Law §§ 240(1) and 241(6) are preempted by federal Maritime Law; and (3) Labor Law §§ 200, 240(1), and 241(6) claims are not viable because Astoria/Orion did not exercise any supervision or control over the methods and materials of his work, his own negligence was the sole proximate cause of his injury, and he was not engaged in any protected activity such as construction, excavation, or demolition work, respectively (Mtn. ¶¶ 6-7). Elliott also adds that Plaintiff is estopped from taking the position against

---

[3] Elliott also argues that as Plaintiff's employer, it is immune from suit under New York Workers' Compensation Law § 11 because Plaintiff did not suffer a "grave injury." Astoria/Orion contends that since there has been no factual detennination that Plaintiff has not suffered a grave injury, it would be premature to release Elliott from it common-law obligations.

[4] Elliott's LHWCA preemption argument is limited to Plaintiff's 240(1) claim, and is not addressed toward Plaintiff's 200 and 241(6) claims (Mtn. at pg. 7).

Elliott that he was engaged in a "local, land-based repair," which is contrary to his argument before the Department of Labor against Orion/Astoria that he was injured while working aboard a vessel.[5]

Astoria/Orion filed a cross-motion joining in Elliott's motion for summary judgment to dismiss the underlying complaint, adding that Plaintiff was not engaged in activity protected under Labor Law, § 240(1) and that Plaintiff was not engaged in gravity-related work when he fell. Also, Astoria/Orion seeks summary judgment on its claims for defense and conditional indemnification against Elliott pursuant to its "Master Agreement" with Astoria. In opposition to dismissal of the indemnification claims, Astoria/Orion argues that in so much as this matter is currently in State Court and there is no pending Federal claim/suit, Elliott's application to dismiss is unwarranted, and Elliott's request that this Court impose Federal Law in a State Action is unwarranted.

Plaintiff opposes both Elliott's motion and Astoria/Orion's cross-motion, arguing that his Labor Law claims are not preempted by Federal law because the "floating electric generating station structure" is not a "vessel in navigation." According to Plaintiff, caselaw provides that the structure here is not a vessel in navigation because it has permanent anchorage, connection to city utilities, lack of propulsion

---

[5] Elliott also points out that Plaintiff's claim under LHWCA 905[b] fails because it is time-barred and Plaintiff cannot show that Orion was negligent.

equipment, no transportation function, and was built and put to a special use, not for transportation, but as an extension of land or a land-based activity. Thus, substantive maritime law does not apply, and Plaintiffs claim, which is pursuant to LHWCA § 933's preservation of third-party claims under state law, is to be analyzed under New York State substantive law. Plaintiff further contends that neither his receipt of LHWCA benefits nor construction work done near navigable waters, creates maritime jurisdiction. And, even if the Court finds maritime jurisdiction over Elliott because of its payment of LHWCA benefits, maritime jurisdiction does not necessarily apply to Plaintiff's claim against Orion.

In the event the Court finds that the floating electric generating station structure at issue is a vessel in navigation, Plaintiff claims that New York's Labor Law still applies under the "maritime but local" doctrine, which allows federal admiralty law to import state substantive law. Such a finding would be one of several factors in determining whether substantive general maritime law principals would apply to preempt plaintiff's Labor Law claims. And, here, the issues predominately are local in concern, fall within the traditional applicable police powers of the State, and there are no countervailing federal concerns affected.

Plaintiff further contends that 33 USC § 905 [b] provides that claims are assertable against the vessel for negligence as otherwise permitted under § 933, and under § 933, the duties imposed by Labor Law §§ 240 (1) and 241(6) are actionable. And, though Plaintiff filed

a workers compensation claim under the LHWCA, he never alleged that the barge was a vessel in navigation, but that the structure was on navigable waters, a major distinction, which entitled him to LHWCA benefits. Finally, Plaintiff maintains that Labor Law §§ 240(1) and 241(6) apply to the accident herein, and Plaintiff was not the sole proximate cause of his injury.

Elliott also opposes Astoria/Orion's cross-motion, arguing that the indemnification is moot since Plaintiff's claims are governed by Federal law, which immunizes Elliott from further liability. In addition, Astoria/Orion would not be entitled to indemnification even if state law applied due to the absence of a "grave injury" and issues of fact as to the scope of the indemnification agreement and whether Elliott was negligent.

As to Plaintiff's dispute that the barge was not a vessel, Elliott points out that the barge at issue floats and can be used as a means of transportation, was specially designed for transporting its own generators, two of the power barges were moved by waterway to Astoria in 1996 to supply energy. And, contrary to Plaintiff's argument, Elliott maintains that Federal courts have admiralty jurisdiction over Plaintiff's claim since the alleged tort occurred on navigable water; and Plaintiff's injury has a significant relationship to traditional maritime activity.

DISCUSSION

To obtain summary judgment the movant must establish its cause of action or defense sufficiently to

warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Const. Co*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Mallad Const. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Appendix C

I. DISMISSAL OF THE COMPLAINT

A. LABOR LAW §§ 240(1) AND 241(6) CLAIMS

The primary issue is whether the LHWCA preempts Plaintiff's Labor Law and negligence claims. In determining the answer to this question, the Court must first address whether the barge in question is a vessel under the LHWCA in order to determine whether the LHWCA is applicable. Upon a finding that the barge is a vessel, and consequently, that the LHWCA applies, the question becomes whether the LHWCA's precludes Plaintiff's claims asserted herein.

1. LHWCA

The LHWCA, which became law in 1927, regulates the relationship between (1) longshoremen/ harbor workers, (2) their employers, and (3) vessel owners (*Gravatt v. City of New York*, 1998 WL 171491 at 13 [S.D.N.Y. 1998]). The LHWCA "establishes a comprehensive federal workers' compensation program that provides longshoremen [and harbor workers][6] and their families with medical, disability,

---

[6] Section 902(3) provides in relevant part: "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel" (33 U.S.C § 902[3]).

and survivor benefits for work-related injuries and death on navigable waters"[7] *(Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46, 779 N.Y.S.2d 168 [1st Dept 2004] *citing Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 96 [1994]; *Guilles v. Sea Land Service, Inc.*, 820 F.Supp. 744 [SDNY 1993]; 33 U.S.C. §§ 902[2], 902[3], and 903).[8] A two-prong inquiry of status and situs summarize the test for determining LHWCA coverage (Danielle E. Hunter, *The Elusive Vessel of Maritime Jurisprudence and Navigation Through the Jones Act and Longshore and Harbor Workers' Compensation Act in Light of Stewart v. Dutra Construction*, 30 Tul. Mar. L.J. 381, 395 [2006], *citing* Robert Force, Admiralty and Maritime Law 102 [2004]). Notably, if the injured employee is physically on navigable waters when the injury occurs, LHWCA coverage is presumed *(see Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 324 [1983]).

Under this workers' compensation system, employers are required to compensate covered employees injured in the course of their employment,

---

[7] Section 902(2) states in relevant part that: "The term 'injury' means accidental injury or death arising out of and in the course of employment . . . ." (33 U.S.C § 902[2]).

[8] Courts have also referred to these workers as "land-based" or "nonseaman" maritime workers *(see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 141 [2d Cir. 2005]; *Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, 818 [2001]).

regardless of fault (*see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 51 *supra; Howlett* v. *Birkdale Shipping Co*, 512 U.S. 92, 96 *supra; Sweeney v. City of New York*, 4 Misc3d 834, 835-36 [Supreme Ct. Kings County, 2004]; *Sutherland v. City of New York*, 266 AD2d 373, 377 [2d Dept. 1999]; 33 U.S.C. § 904).[9] However, under § 905(b),[10] an injured worker may also

---

[9] Section 905(a) states in relevant part: "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

[10] Section 905(b) states in relevant part: "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or

bring an action against a vessel owner for its own negligence without losing his or her worker-compensation rights *(see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 51 [1st Dept. 2004]; *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 96 [1994]; *Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings County, 2004]; *Sutherland v. City*

---

anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provision of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the' contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

of New York, 266 AD2d 373, 377 [2nd Dept. 1999]; Danielle E. Hunter, *The Elusive Vessel of Maritime Jurisprudence and Navigation Through the Jones Act and Longshore and Harbor Workers' Compensation Act in Light of Stewart v. Dutra Construction*, 30 Tul. Mar. LJ. 381, 395 [2006]; 33 U.S.C. § 905[b]).

Thus, in the situation where the employer and the vessel owner are independent entities, the worker may obtain workers' compensation from his or her employer and damages resulting from the vessel owner's negligence *(see Howlett v. Birkdale Shipping Co*, 512 U.S. 92, 96 [1994]; *Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings County, 2004]; *Sutherland v. City of New York*, 266 AD2d 373, 377 [2nd Dept. 1999]; 33 U.S.C. § 905[b]).[11] Although the "LHWCA does not define negligence for the purpose of actions against third-party vessel owners under § 905(b)" . . . "the Supreme Court articulated federal common-law standards to guide judicial determinations of liability under this subsection, articulating three duties of care owed by vessel owners to the

---

[11] The employer's immunity from tort liability is not absolute. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 [1983], the United State Supreme Court held that 33 U.S.C. § 905(b) authorizes a negligence action against a vessel even if the owner is also the worker's employer, but only to the extent that the vessel owner is negligent in its capacity as a vessel owner and not in its capacity as employer *(see Jones & Laughlin Steel Corp.*, 462 U.S. at 531, n.6).

longshoremen, *to wit*, the 'turnover duty,' the 'active control duty' and the 'duty to intervene' *(see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46, 52 [1st Dept. 2004]). Integral to maintaining a suit for negligence against the vessel owner under § 905(b) is a finding that the person injured is a covered worker within the meaning of § 902(3) *(see Sweeney v. City of New York*, 4 Misc3d 834, 836 [Supreme Ct. Kings County, 2004]) as well as a finding that the watercraft in question is a vessel *(see Emanuel v. Sheridan Transp. Corp.*, 10 AD3d 46 [1st Dept. 2004]; 11 N.Y. Jur.2d Boats, Ships, and Shipping § 212; 33 U.S.C. § 905(b); *see also* Eric V. Hull, *Through the Looking Glass: Judicial Interpretation of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory*, 16 U.S.F. Mar. L.J. 321, 324 [2003-2004]).

The Court adopts the determination by the Department of Labor in Plaintiff's workers' compensation proceeding that Plaintiff is a covered employee within the meaning of § 902(3), and proceeds to determine the barge on which Plaintiff was injured qualifies as a vessel.

Appendix C

2. VESSEL STATUS[12]

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means what I choose it to mean--neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things" (Lewis Carroll, *Through the Looking-Glass and What Alice Found There* 106 [Charles Lutwidge Dodgson ed., Peter Pauper Press 1953] [1872]).

The undertaking of defining a "vessel," though not novel, is not simple. In fact, one author has stated that "[i]f the term vessel had a simple, universally-accepted definition," his law journal article would have no purpose (Eric V. Hull, *Through the Looking Glass: Judicial Interpretation of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory,* 16

---

[12] "[I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world" (*Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 [2005], quoting *Saylor v. Taylor*, 77 F.476, 479 [4th Cir. 1896]).

U.S.F. Mar. LJ. 321, n1 [2003-2004]). The common sense notion of the term as a structure built to transport goods and passengers over water has proved to be somewhat elusive in the legal setting. The "vessel" issue typically arises with regard to a floating structure that has a specialized purpose and the transportation function of such a structure is merely just incidental.

Elliott and Astoria/Orion contend that the LHWCA is Plaintiff's exclusive remedy. In its reply papers, Elliott highlights that the barge should be considered a vessel under the LHWCA because (1) it floats and can be used as a means of transportation on water; (2) it can be transported over water; (3) it has been transported over water to other parts of the city to provide electricity; (4) it is not permanently moored to its berth, sunk in place, or withdrawn from the water; and (5) it is subject to regulation by the U.S. Coast Guard.

On the other hand, Plaintiff contends that (1) it was designed and built for the exclusive purpose of being a power plant and not as a means of transportation on water; (2) it is secured to the land; (3) the craft is permanently moored; (4) it does not serve any maritime purpose; (5) it receives utilities from shore; and (6) it is not self propelled and does not carry any running lights. In summary, the "power plant does not meet any of the *tests* for being a "vessel" (emphasis added).

Courts and agencies have reached different conclusions concerning the status of the barge in

question. However, as will be explained in greater detail below, no court has expressly determined whether the specific barge at issue is a "vessel" under the LHWCA.

In *Matter of Consolidated Edison Company of New York, Inc., et al., v. City of New York, et al.* (44 NY2d 536 [1978]), the New York State Court of Appeals addressed whether the barges in question could be taxed as real property *(Id.* at 541). The court held that they could be, but confined its finding to "real estate tax purposes" *(Id.* at 543). The Court's decision is only relevant to the instant case to the extent that its analysis included a similar description, location, and connection of the barges to the land as this court has noted *(Id.* at 538-39). The court concluded that the barges fit within the definition of real property under section 102 (subd 12, par [b]) of the Real Property Tax Law, which described improvements constituting real property as, *inter alia*, ". . .substructures and superstructures erected upon, under or above the land, or affixed thereto, including bridges and wharfs and piers" *(Id.* at 541). Since power plants fall within the "familiar connotation of structures" *(Id.* at 541), the court saw no reason to differentiate between improvements to the land by horizontal annexation rather than the more traditional vertical annexation *(Id.* at 543). However, as the court noted, its holding was limited *(Id.* at 543). As such, the Court of Appeals' determination has no bearing on the instant case.

In *Caserma v. Consolidated Edison Co.* (BRB No. 97-0770 [March 6, 1998]), the Benefits Review Board, a division of the United States Department of

Labor, stated that it was undisputed that the barges in question could be transported over water for maintenance or to other locations to generate electricity as needed. The Board found that a determination could be made that the barges in question were vessels *(Id.* at fn 5).

The United States Supreme Court has recently elucidated a single test for determining the meaning of the term "vessel" for the purpose of LHWCA. In *Stewart v. Dutra Construction Co.*, (543 U.S. 481 [2005]), the Court considered the issue of whether a dredge, a floating platform with a bucket that removes silt from the ocean floor, is a "vessel" under the [LHWCA]," and concluded that it is *(Stewart*, 543 U.S. at 484; *see also Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). The Court held that a vessel is every description of Watercraft or other artificial contrivance "'used, or capable of being used, as a means of transportation on water'" *(Stewart*, 543 U.S. at 489, quoting Rev. Stat. § 3, codified at 1 U.S.C. § 3; *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005])[13], but "it does not require that a

---

[13] Some courts have expressed discomfort with the breadth of 1 U.S.C. § 3 stating that, "[n]o doubt the three men in a tub would also fit within our definition [of a vessel under 1 U.S.C. § 3] and one probably could make a convincing case for Jonah inside the whale" *(see* Eric Y. Hull, *Through the Looking Glass: Judicial Interpretation of Vessel Status Leaves Injured Workers Adrift in Uncharted Territory*, 16 U.S.F. Mar. LJ. 321, 324 [2003-

watercraft be used *primarily* for that purpose" (*Stewart*, 543 U.S. at 495). The Court further stated that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time" (*Stewart*, 543 U.S. at 496), "permanently moored, or otherwise rendered practically incapable of transportation or movement" (*Stewart*, 543 U.S. at 494; *see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). However, "a [watercraft] does not move in and out of 'vessel' status because it is temporarily 'at anchor, docked ... or berthed for minor repairs'" (*Stewart*, 543 U.S. at 494; *see Uzdavilles v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). Provided a watercraft's use as a means of transportation remains a "practical possibility," rather than "merely a theoretical one," it qualifies as a "vessel in navigation" for the purposes of the *LHWCA*. (*Stewart*, 543 U.S. at 496; *see Uzdavilles v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]). In applying this analysis to the dredge in *Stewart*, the Supreme Court emphasized that the dredge "was not only 'capable of being used' to transport equipment and workers over water—it was used to transport those things" (*see Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005]).

The Court's sweeping definition of a vessel under the LHWCA has not prevented the instant litigation from coming forth. However, in applying the *Stewart* analysis to the instant case, the Court

---

2004], citing *Burks v. Am. River Transp. Co.*, 679 F.2d 69, 75, 1983 AC 2208 [5th Cir. 1982]).

concludes that the barge in question qualifies as a vessel under the LHWCA and that Plaintiff's assertions to the contrary are unpersuasive.

It is undisputed that the barge in question is a watercraft floating on water. Despite Plaintiff's contentions, it is not permanently moored. Rather, as noted above, it is attached to the adjacent land *via* a spud beam clamping system, as well as a series of utility connections, which can be, and has been, disengaged to allow the barge to be transported across water either for repairs or to provide electricity to other locations. It is undisputed that this has occurred in the past, thus suggesting that the barge's use as a means of transportation remains a "practical possibility," rather than "merely a theoretical one" *(see Uzdavilles v. Weeks Marine, Inc.*, 418 F.3d 138, 144 [2nd Cir. 2005], quoting *Stewart*, 543 U.S. at 496). Thus, Plaintiff's contentions that the barge is not a vessel because it does not serve a maritime purpose and that it was designed and built for the purpose of being a power plant and not as a means of transportation on water are irrelevant in light of *Stewart*.

Furthermore, Plaintiff's contention that the barge is not a vessel because it lacks a propulsion system is itself lacking. The vessel in *Stewart* was also found to be without certain traditional characteristics common to watercraft such as propulsion system, but the Court did not find this fact dispositive to its determination. Instead, it noted that the vessel had previously been moved long distances by tugboat.

Appendix C

Plaintiff also cites an array of cases dealing with everything from floating casinos, fish processing plants, wharfboats, floating dormitories, submersible barge fabrication structures, dry docks, and floating oil and grain storage facilities, which were all held *not* to be vessels, in a vain attempt to persuade the Court that the barge in question is not a vessel (Opp. pg. 11-18). However, all of the cases cited by Plaintiff *predate Stewart*, and are factually distinguishable in that the barge in question has been, and is practicably capable of being, used as a means of transportation. Nor can it be said that the barge at issue is permanently moored or moored in an indefinite manner.

The record demonstrates that the barge in question is a vessel within the definition articulated in *Stewart*. As this Court finds that the barge at issue is a "vessel, the remaining issue is whether LHWCA § 905(b) preempts the Labor Law and indemnification claims herein. In this regard, Federal law preempts state law in three instances: (1) "by express provision in the Federal statute"; (2) "by inference, where the Federal legislative scheme is so pervasive and the character of the obligations imposed leaves no room for the State or local government to legislate"; and (3) "to the extent that the State or local law actually conflicts with the Federal law, for example where compliance with both is impossible or adherence to the State or local law would thwart the objectives of its Federal counterpart" (*City of New York v. Job-Lot Pushcart*, 88 N.Y.2d 163 [1996]).

3. LABOR LAW §§ 240(1) AND 241(6) CLAIMS PREEMPTED

Contrary to Plaintiff's contentions, his Labor Law §§ 240(1) and 241(6) claims against the vessel owner, Astoria/Orion, are preempted by the LHWCA.

Section 905 (b) provides, in pertinent part, that in "the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party[14] in accordance with the provisions of section 933 of this title" . . . and "[t]he remedy provided in this subsection shall be *exclusive* of all other remedies against the vessel except remedies available under this Act" (33 U.S.C. 905 [b]). Thus, although the employee is barred from suing his employer in tort, the employee may sue negligent third parties in tort, notwithstanding his entitlement to no-fault compensation provided by the employer (*see* 33 U.S.C. § 933(a) ["If . . . the person entitled to . . . compensation determines that some person other than the employer . . . is liable in damages, he need not elect whether to

---

[14] 14 Congress used the term "third party" to describe suit against a "vessel" (*see Guilles v. Sea-Land Service, Inc.*, 820 F.Supp 744, 751, fn 5 [S.D.N.Y. 1993]). In this statutory context, the phrase "third party" merely means that the vessel itself call be sued as if it were a third party (*see Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 385 [2d Cir. 1993] *affd., Guilles v. Sea Land Sereice, Inc.*, 12 F.3d 381 *supra*).

receive such compensation or to recover damages against such third person"]).

The Court notes that in 1972, Congress amended the LHWCA to, among other things, eliminate the injured worker's strict liability remedy against the vessel owner *(see Guilles v. Sea-Land Service, Inc.,* 12 F.3d 381, 384 [2d Cir. 1993]; *Guilles v. Sea-Land Service, Inc.,* 820 F.Supp 744, 749 [S.D.N.Y. 1993]; *Director, OWCP v. Perini North River Asso.,* 459 U.S. 297 [1983]) and limit an injured worker's right to recover from a vessel owner solely to a negligence action *(see* 11 N.Y. Jur. 2d Boats, Ships, and Shipping § 212]; *see also Gravatt v. City of New York,* 226 F.2d 108, 117 [2nd Cir. 2000], *citing* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704). The United State Supreme Court has noted that under § 905(b), a vessel owner may only be held liable for its own negligence and that the section expressly preempts all other claims against a vessel owner *(see Norfolk Shipbuilding & Drydock Corporation v. Garris,* 532 U.S. 811, 818 [2001]; *see also* 11 N.Y. Jur. 2d Boats, Ships, and Shipping § 212 [an injured worker's right to recover from a vessel owner is limited solely to a negligence action]).

Thus, upon a plain reading of the statute and caselaw, it is apparent to the Court that § 905(b) expressly preempts all causes of action against a vessel owner except those brought pursuant to § 905(b) in negligence *(see Guilles v. Sea-Land Service. Inc.,* 12 F.3d 381, 386 [2d Cir. 1993]; *Sweeney v. City of New York,* 4 Misc.3d 834, 782 N.Y.S.2d 537 [NY 2004] ["under section 905 (b) of the LHWCA, an injured maritime worker may maintain an action against a

vessel owner for its negligence"]; *see also* H.R. Rep. No 98-570(I), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2741 ["The Committee intends that this language [in section 905(b)] not be construed to limit an employee's right to bring a cause of action, except in the circumstances indicated with the language"]). Contrary to the moving defendants' contentions, the LHWCA is the exclusive remedy for Plaintiff as agninst Plaintiffs employer, Elliot, but not as against a third party, *to wit:* Astoria/Orion, the vessel owner. Indeed, Plaintiff may seek redress against the vessel owner for negligence, in accordance with section 933 of the LHWCA.

Section 240(1) is a strict liability statute in which the owner and the general contractor are made liable if the worker is accidentally hurt in a fall where a proper safety device would have prevented the injury, to which contributory negligence is no defense *(Norfolk Shipbuilding & Drydock Corporation v. Garris,* 532 U.S. 811, 818 [2001]). Thus, section 240(1) conflicts with § 905(b), given that 905 (b) creates a cause of action for negligence, solely. Also, Congress specifically amended the LHWCA to eliminate the injured worker's strict liability remedy against the vessel owner *(see Guilles v. Sea-Land Service, Inc.,* 12 F.3d 381, 384 [2nd Cir. 1993]; *Guilles v. Sea-Land Service, Inc.,* 820 F.Supp 744, 749 [S.D.N.Y. 1993]; *Director, OWCP v. Perini North River Associates,* 459 US 297 [1983]); *cf. Rigopoulos v. State of New York,* 236 AD2d 459, 460 [1997] and *Eriksen v. Long Island Lighting Co.,* 236 AD2d 439, 440 [2nd Dept. 1997]). And, Congress intended that comparative negligence should apply in cases where the injured employee's own negligence may have

contributed to causing the injury *(see also Gravatt v. City of New York,* 226 F.2d 108, 118 [2nd Cir. 2000] *citing* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705).

Section 241(6) is a fault provision that deals with construction, excavation, and demolition work and requires conformity to safety regulations in which a property owner may be held vicariously liable for the negligence of a third party *(see* Paul S. Edelman, State Labor Law May be Applied in Maritime Cases, 1/29/2001 NYLJ 3, [col. 1]). However, § 905(b) only provides for liability based on actual negligence and does not provide for vicarious liability *(see Norfolk Shipbuilding & Drydock Coporation,* 532 U.S. at 818; *see also Gravatt v. City of New York,* 226 P.2d 108, 117 (2nd Cir. 2000], citing H.R.Rep. No. 92-1441; 1972 U.S.C.C.A.N. at 4704 ["The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore"]).

In further evidence of a conflict, "[i]t is axiomatic that the statutory duties imposed (by Labor Law §§ 240[1] and 241[6]) place strict liability for safety practices upon owners of the worksite and general contractors" *(see Sweeney,* 4 Misc3d at 849, quoting *Sabato v. New. York Life Ins. Co.,* 259 AD2d 535), whereas § 905(b) places strict liability upon the *employer* of the injured worker *(see Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 97 [1994]; *see also see also Gravatt v. City of New York,* 226 F.2d 108, 118 [2nd Cir. 2000], citing *Canizzo v. Farrell Lines, Inc.,* 579 F.2d 682, 687-88 [2nd Cir. 1978] [Friendly, J., dissenting] ["Recognizing that Congress conceived

statutory compensation payments 'as theusual source of making the [covered employee] whole,' we have cautioned that '[c]ourts must be exceedingly careful in defining the contours of the [covered employee's] action for negligence against the ship . . . lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels . . .'"]). Applying the Labor Law to the instant case would place strict liability for the safety on the vessel owner, Astoria/Orion, rather than on the employer, Elliott, in direct contradiction to the intent of Congress.

Thus, regardless of whether express intent to preempt state law may be gleaned from § 905(b), it is apparent from the pervasiveness of the LHWCA and the conflict between federal and state law that federal law, in this instance, preempts Plaintiff's Labor Law §§ 240(1) and 241(6) claims. And, Plaintiff's "maritime but local" argument is insufficient. As such, plaintiffs' New York State Labor Law §§ 240(1) and 241(6) causes of action against the vessel owner, Astoria/Orion, are preempted, and therefore, dismissed.

B. LABOR LAW § 200 CLAIM

Labor Law § 200 codifies the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v. Essex Owners Corp.*, 276 A.D.2d 315, 714 N.Y.S.2d 38 [1st Dept 2000]; citing *Blessinger v. The Estee Lauder Co.*, 271 A.D.2d 343, 707 N.Y.S.2d 78), but "[a]n implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'"

Appendix C

(Blessinger, supra, quoting *Russin v. Picciano & Son,* 54 N.Y.2d 311, 317, 445 N.Y.S.2d 127, 429 N.E.2d 805). In addition to showing that the defendant exercised supervisory direction or control over the operation, plaintiff also must show that the defendant had actual or constructive notice of the alleged unsafe condition that caused the accident *(Dilena v. The Irving Reisman Irrevocable Trust,* 263 A.D.2d 375, 692 N.Y.S.2d 371); *Lombardi v. Stout,* 80 N.Y.2d 290, 294, 590 N.Y.S.2d 55). Further, liability does not attach under section 200 absent actual or constructive notice of the condition complained of *(see Miller v Perillo,* 71 AD2d 389, 391, *app dsmd* 49 NY2d 1044, *mot for lv to app dsmd* 51 NY2d 767; *Zaulich v Thompkins Sq. Holding Co.,* 10 AD2d 492, 496).

The record clearly demonstrates that Astoria/Orion did not exercise any supervision or control of the methods or materials of Plaintiff's work. The record indicates that Plaintiff only received instruction from Elliott's personnel.

The Court also notes that the Complaint also fails to assert a cause of action for negligence against Astoria/Orion *pursuant to section 905(b),* or that said defendant violated any of the duties imposed upon vessel owners, such as the turnover duty, the active control duty, or the duty to warn. Finally, Plaintiff's "maritime but local" argument is insufficient. Having failed to allege a claim of negligence in accordance with the LHWCA, and upon dismissal of Plaintiff's Labor Law claims, the Plaintiff's complaint is dismissed in its entirety.

Appendix C

II. DISMISSAL OF THE THIRD-PARTY COMPLAINT

Notwithstanding the above dismissal of the complaint, the Court finds that the LHWCA also preempts the third-party action herein. The LHWCA provides, in pertinent part,

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel . . . *and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . .*
>
> (emphasis added).

23 U.S.C. § 905(b).

The language of section 905(b) is not ambiguous and the above-cited clause clearly bars liability of the employer (Elliott) to the barge/vessel owner (Astoria/Orion) *(see Kramer v Bouchard Transp. Co. Inc.*, 741 F.Supp. 1023 [E.D.N.Y. 1990]). In the face of this irreconcilable conflict, the LHWCA must control, and the third-party complaint against Elliott must therefore be dismissed *(Kramer v. Bouchard Transp. Co. Inc.*, 741 F.Supp. 1023, *supra Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 894 [2d Cir. 1976; *Lou v. Belzberg*, 728 F.Supp. 1010, 1016 [S.D.N.Y. 1990]). The instant matter is an action

directly against the barge owner, Astoria/Orion; and the third-party complaint by the vessel herein seeks to impose barge-related liability on the employer, Elliott, which is expressly forbidden by section 905(b) *(see Kramer supra)*. Therefore, "at least to this limited extent, the federal remedy (or, more precisely, non-remedy) preempts the state remedy" *(see Kramer v. Bouchard Transp. Co. Inc.*, 741 F.Supp. at 1026; *cf Hartley v. City of New York*, 163 Misc. 2d 540, 621 N.Y.S.2d 789 [Sup. Ct. Kings County 1994] (stating that construction company's "status as a vessel or non-vessel is significant, because if [company] is considered a vessel, then a contribution or an indemnification claim by [said company against plaintiff's employer is barred. A non-vessel, on the other hand, may bring an action for indemnity based on an express agreement "since the employer's liability 'springs from an independent contractual right'"], *affd.* 228 A.D.2d 646, 646 N.Y.S.2d 351 [2d Dept 1996] [a nonvessel may pursue, *inter alia*, its contractual remedies against an "employer"]).

For the foregoing reasons, the Court holds that § 905(b) of the LHWCA preempts Astoria/Orion's third-party claims for common law and contractual defense and indemnification against Elliott.

CONCLUSION

Elliott's motion for summary judgment dismissing the third-party complaint and Plaintiff's complaint is granted. The branch of Astoria/Orion's cross-motion for summary judgment dismissing the Plaintiff's complaint, is also granted. The branch of

Appendix C

Astoria/Orion's cross-motion for summary judgment granting conditional defense and indemnification is denied. The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 12, 2007

APPENDIX D — ORDER OF THE STATE OF NEW YORK, COURT OF APPEALS DATED MARCH 25, 2010

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of March, 2010

Present, HON. JONATHAN LIPPMAN, *Chief Judge, Presiding.*

Mo. No. 2010-27

James D. Lee,

Respondent,

v.

Astoria Generating Company, L.P., et al.,

Appellants.

(And a Third-Party Action.)

Appendix D

A motion for reargument to the Court of Appeals in the above cause having heretofore been made upon the part of the respondent herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Richard A. Reed
Deputy Clerk of the Court

APPENDIX E — RELEVANT PORTIONS OF REFERENCED STATUTES

TITLE 1 RULES OF CONSTRUCTION

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

33 USC § 901 et seq. Longshore and Harbor Workers Compensation Act

§ 901. Short title

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

§ 902. Definitions

When used in this chapter—

(1) The term "person" means individual, partnership, corporation, or association.

Appendix E

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship breaker...

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in

respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

Appendix E

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with

the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 933. Compensation for injuries where third persons are liable

(a) Election of remedies

Appendix E

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

NEW YORK LABOR LAWS

ARTICLE 7 GENERAL PROVISIONS

§ 200. General duty to protect health and safety of employees; enforcement.

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section...

ARTICLE 10 BUILDING CONSTRUCTION, DEMOLITION AND REPAIR WORK.

§ 240. Scaffolding and other devices for use of employees.

Appendix E

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed. No liability pursuant to this subdivision for the failure to provide protection to a person so employed shall be imposed on professional engineers as provided for in article one hundred forty-five of the education law, architects as provided for in article one hundred forty-seven of such law or landscape architects as provided for in article one hundred forty-eight of such law who do not direct or control the work for activities other than planning and design. This exception shall not diminish or extinguish any liability of professional engineers or architects or landscape architects arising under the common law or any other provision of law.

2. Scaffolding or staging more than twenty feet from the ground or floor, swung or suspended from an overhead support or erected with stationary supports, except scaffolding wholly within the interior of a building and covering the entire floor space of any

room therein, shall have a safety rail of suitable material properly attached, bolted, braced or otherwise secured, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the outside and the ends thereof, with only such openings as may be necessary for the delivery of materials. Such scaffolding or staging shall be so fastened as to prevent it from swaying from the building or structure.

3. All scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon when in use.

§ 241. Construction, excavation and demolition work.

All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and

contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

No. 09-1567

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

v.

ASTORIA GENERATING COMPANY, L.P.,
ORION POWER NEW YORK GP, INC., and
ELLIOTT TURBOMACHINERY CO., INC.,

Respondents.

On Petition For A Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JOHN SANDERCOCK
Counsel of Record
CURT J. SCHINER
STEVEN B. PRYSTOWSKY
LESTER SCHWAB KATZ & DWYER, LLP
120 Broadway
New York, New York 10271
212-964-6611
jsandercock@lskdnylaw.com

Counsel for Respondent Elliott Turbomachinery Co., Inc.

July 23, 2010

COUNTER-QUESTIONS PRESENTED

1. Did Petitioner present compelling reasons for this Court to grant the Petition, where the decision of the New York Court of Appeals that *Gowanus Bay No. 1* is a "vessel" is a fact-specific application of this Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), and is consistent with recent opinions of the Seventh and Eleventh Circuits?

2. Did Petitioner present compelling reasons for this Court to grant the Petition, where the Record contains no facts to help this Court resolve an apparent conflict among the Circuits concerning whether an indefinitely moored riverboat casino is a "vessel", where Petitioner would be taking the opposite position from the injured workers in the cases which present the conflict, and where the state courts have already dismissed his cause of action for common-law negligence based on the very same state law standards he seeks to import into 33 U.S.C. § 905(b)?

3. Did Petitioner present compelling reasons for this Court to grant the Petition, where the decision of the Court of Appeals expressly avoids the broader issue presented in many more cases whether federal maritime liability standards impliedly preempt the application of New York Labor Law §§ 240(1) and 241(6) to accidents involving construction workers on navigable waters?

CORPORATE DISCLOSURE STATEMENT

Elliott Ebara Company Limited and Ebara Corporation are the publicly held parent corporations of Respondents Elliott Turbomachinery Co., Inc., and Elliott Company.

TABLE OF CONTENTS

	Page
COUNTER-QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
New York Labor Law	3
Proceedings Below	6
Misstatements in the Petitioner's Brief ...	8
REASONS FOR DENYING THE PETITION	
THE COURT OF APPEALS' DECISION DOES NOT IMPLICATE ANY OF THE TRADITIONAL FACTORS THAT THE COURT ROUTINELY RELIES UPON IN GRANTING CERTIORARI	11
A. The Petition should be denied because this case is simply a fact-specific application of *Stewart v. Dutra* by a state court	13

Page

B. The Petition should be denied because the Court of Appeals' decision does not conflict with relevant decisions of this Court or a United States Court of Appeals 16

1. This case has nothing to do with casino boats in the Fifth Circuit... 16

2. Petitioner's claim against Astoria/ Orion is within the admiralty jurisdiction 19

3. Petitioner's negligence claim was dismissed on state law grounds 21

C. The Petition should be denied because the Court of Appeals avoided the real issue in this case 22

CONCLUSION 25

CERTIFICATION 26

TABLE OF AUTHORITIES

Page(s)

Cases:

Alderman v. Pacific Northern Victor, Inc.,
95 F.3d 1061 (11th Cir. 1996) 21

American Dredging Co. v. Miller,
510 U.S. 443 (1994) 23

Anaya v. Traylor Brothers, Inc.,
478 F.3d 251 (5th Cir. 2007) 21

Black v. Cutter Laboratories,
351 U.S. 292 (1956) 20

Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280 (2003) .. 4

Bland v. Manocherian,
66 N.Y.2d 452 (1985) 5

Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans,
535 F.3d 1299 (11th Cir. 2008) 2, 13, 14, 15, 16, 17

Calhoun v. Yamaha Motor Corporation, U.S.A.,
216 F.3d 338 (3rd Cir.), *cert. denied*,
531 U.S. 1037 (2000) 23

California v. Rooney,
483 U.S. 307 (1987) 20

Cammon v. City of New York,
95 N.Y.2d 583 (2000) 2, 22, 24

Page(s)

Caserma v. Consolidated Edison,
BRB No. 97-0770, 1998 WL 155555
(March 6, 1998) 10

Comes v. New York State Elec. and Gas Corp.,
82 N.Y.2d 876 (1993) 3

Connors v. Boorstein,
4 N.Y.2d 172 (1958) 4

Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc.2d 1065
(Sup. Ct., Kings. Co. 1975) 9, 10, 11

De La Rosa v. St. Charles Gaming Co., Inc.,
474 F.3d 185 (5th Cir. 2006) 2, 16

Gravatt v. City of New York,
1998 WL 171491 (S.D.N.Y. 1998) 23

Holmes v. Atlantic Sounding Co., Inc.,
437 F.3d 441 (5th Cir. 2006) 18

Howard v. Southern Illinois Riverboat Casino Cruises, Inc., 364 F.3d 854 (7th Cir.), *cert. denied*, 543 U.S. 942 (2004) ... 16

James Stewart & Co. v. Sadrakula,
309 U.S. 94 (1940) 5

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) ... 21

Lee v. Elliott Turbomachinery,
BRB No. 02-0761 (July 23, 2003) 3

	Page(s)
Lochner v. New York, 198 U.S. 45 (1905)	23
Lockheed Martin Corp. v. Morganti, 412 F.3d 407 (2d Cir. 2005)	20
McLaurin v. Noble Drilling (US) Inc., 529 F.3d 285 (5th Cir. 2008)	19
Martinez v. Pacific Indus. Service Corp., 904 F.2d 521 (9th Cir. 1990)	20
May v. Transworld Drilling Co., 786 F.2d 1261 (5th Cir. 1986)	19
Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001)	1, 11
O'Hara v. Weeks Marine, Inc., 294 F.3d 55 (2d Cir. 2002)	22, 24
Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925)	1, 5, 23
Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509 (1991)	4
Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311 (1981)	4
Scindia Steam Nav. Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981)	4
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	23

Page(s)

Stewart v. Dutra Construction Co.,
543 U.S. 481 (2005) ..... *passim*

Tagliere v. Harrah's Illinois Corp.,
445 F.3d 1012 (7th Cir. 2006) 2, 13, 14, 15

Vasquez v. GMD Shipyard Corp.,
582 F.3d 293 (2d Cir. 2009) 24

Yamaha Motor Corporation U.S.A.
v. Calhoun, 516 U.S. 199 (1996) 22

Statutes

Supreme Court Rule 10 ..... 11, 12, 13, 16

Longshore and Harbor Workers
Compensation Act ("LHWCA"),
33 U.S.C. § 902(3) 20

LHWCA, 33 U.S.C. § 905(b) ..... *passim*

LHWCA, 33 U.S.C. § 933 ..... 11, 19

Extension of Admiralty Jurisdiction Act,
46 U.S.C. App. § 740 15

New York Labor Law § 200 ..... 3, 21, 22

New York Labor Law § 240(1) 3, 4, 22, 23

New York Labor Law § 241(6) 3, 4, 22, 23

Page(s)

Other authorities

Raymond C. Green, "Federal General Maritime Law or State Law: Which Rules in Marine Construction Workers' Tort Actions Against Third Parties", 3 Benedict's Mar. Bull. 289 (3d Quarter 2005) 24

David W. Robertson, "How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and other areas of Maritime Law", 39 J. Mar. L. & Com. 115 (April 2008) 17

INTRODUCTION

This case involves a highly fact-specific application of the criteria set forth by this Court in *Stewart v. Dutra Construction*, for determining whether an unusual watercraft is a "vessel" for the purposes of the Longshore and Harbor Workers Compensation Act ("LHWCA"). After determining that *Gowanus Bay No. 1*, a power generating barge, is a vessel, the New York Court of Appeals held that section 905(b) of the LHWCA expressly preempts sections of the New York Labor Law which would otherwise have imposed strict and vicarious liability for a workplace accident on the owner of that vessel and disrupted the uniform federal scheme governing compensation for maritime workers and liability for maritime torts.[1] This Court should deny the Petition because no error was committed below, and certiorari is rarely appropriate when the asserted errors consist of erroneous factual findings or the misapplication of properly stated rules of law.

---

[1] This Court has already held that the New York Labor Law has no application in a negligence action brought in a state court by a ship repairer who fell from a broken plank scaffold into the hold of a ship. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). The decision predates the enactment of the LHWCA but, like Petitioner, the injured worker in that case would today be covered by the LHWCA. *Dahl* was last cited by this Court in *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 813 (2001)(recognizing a maritime remedy for wrongful death rather than require an admiralty court to accommodate a state remedial statute).

Petitioner asserts there is a conflict among the Circuits concerning the application of the *Stewart* criteria to indefinitely moored riverboat casinos in the Fifth, Seventh and Eleventh Circuits. *See De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185 (5th Cir. 2006), *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), and *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). The Record in this case, however, contains no facts to help this Court discriminate among the various types of non-cruising casinos, and the decisions below do not address the application of the Jones Act to land-based casino staff (i.e., waiters and bartenders), which is the real issue underlying most decisions concerning the "vessel" status of such casinos. In addition, Petitioner's negligence argument is moot because the New York state courts have already dismissed his cause of action for common-law negligence based on the very same state law standards he seeks to import into 33 U.S.C. § 905(b).

Finally, this atypical case should not be the vehicle for deciding whether liability for injuries to marine construction workers in New York should be governed by state or federal standards. If, however, this Court decides to grant the Petition, it should direct the parties to brief the issue whether *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), was rightly decided.

STATEMENT OF THE CASE

Petitioner James Lee was injured while working for Elliott on a barge floating on navigable water. He applied for and was awarded benefits under the LHWCA because he was injured while working on navigable water. *Lee v. Elliott Turbomachinery*, BRB No. 02-0761 (July 23, 2003) (unpublished decision).

After Petitioner successfully asserted he was injured at a maritime situs while performing traditional maritime work and was, therefore, a "covered employee" entitled to LHWCA benefits, he commenced an action to recover damages for personal injuries in Supreme Court, New York County, alleging that the defendants violated New York Labor Law §§ 200, 240(1) and 241(6). Defendants, in turn, commenced a third-party action against Elliott seeking common-law and contractual indemnification under New York law.

New York Labor Law

Labor Law § 200 codifies the common-law duty imposed on owners, employers and contractors to provide workers with a reasonably safe place to work. *Comes v New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). *See also* Pet. App. C, 83a-84a and Pet. App. B, 35a.

By contrast, Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in construction, excavation, or

demolition. *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 317 (1981).

Labor Law § 240(1), also known as the Scaffold Law, affords special protection to construction workers engaged in activities that "entail a significant inherent risk because of the relative elevation at which the activities must be performed or at which materials or loads must be positioned or secured." *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991).

Labor Law §§ 240(1) and 241(6) are near mirror images of the shipowner's liability to longshore and harbor workers for unseaworthiness which was abolished by the enactment of the 1972 amendments to the LHWCA, including 33 U.S.C. § 905(b). *See Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 164-166 (1981).

The Scaffold Law predates workers' compensation laws and was originally enacted to protect the workers building Manhattan's skyscrapers;[2] but its reach has expanded. The present statute, Labor Law § 240, was adopted in 1921 and was derived from sections of its predecessor. The statute has developed an extensive judicial gloss; there are over 1,000 appellate cases discussing various aspects of Labor Law § 240(1).

---

[2] The initial legislation was enacted in 1885 under the title, "An act for the protection of life and limb". *See Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 (2003), *Connors v. Boorstein*, 4 N.Y.2d 172 (1958).

The Scaffold Law currently imposes absolute (strict) liability on an owner or general contractor who fails to provide safety devices, e.g., ladders, scaffolds, ropes, constructed, placed, operated and maintained to give proper protection to the person performing the work. The duty is non-delegable. The plaintiff only needs to prove that the statute was violated and that the violation was a proximate cause of his or her injury. *Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Negligence, including the plaintiff's comparative fault, and notice are irrelevant; however, the New York Court of Appeals has held that an owner or contractor is not liable under the statute if the worker's own negligence was the sole proximate cause of his or her injuries.

This Court once held that the Scaffold Law had no application in a negligence action brought in a state court by a ship repairer who fell from a broken plank scaffold into the hold of a ship. *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449 (1925). The only other reported decision of this Court concerning these sections of the New York Labor Law is *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940), holding that a general contractor was not relieved of its obligations under the Labor Law simply because exclusive authority over the site of the post office it was building in New York City had been transferred to the federal government with the consent of New York.

Proceedings below

Elliott and the defendants moved for summary judgment dismissing the complaint because there was no evidence of negligence on the part of the defendants, and sections 240(1) and 241(6) of the New York Labor Law were expressly preempted by 33 U.S.C. § 905(b) which eliminates the warranty of seaworthiness and provides that a covered employee may bring an action for damages caused by "the negligence of a vessel".

Petitioner argued that the Labor Law was not preempted because the barge was not a "vessel" under *Stewart v. Dutra*, and because his action was outside the scope of federal admiralty jurisdiction.[3]

Elliott and the defendants replied that *Gowanus Bay No. 1* met the criteria in *Stewart* for finding that the barge was a vessel. It was a watercraft floating on water, and was not permanently moored. It was capable of being used for marine

---

[3] Because Petitioner was not required to show that his injury occurred on a "vessel" to prevail on his claim for LHWCA benefits, he is not estopped to deny that the barge was a vessel. However, as the dissenting justice in the Appellate Division pointed out, in the administrative proceedings on the claim for LHWCA benefits, Petitioner's counsel specifically argued that Petitioner's work on the barge "subjected [him] to a certain element of danger which comes with working on the water"; that "the barge rocks and moves with wind and the tide"; and that plaintiff's work was "not land-based." Petitioner's counsel even referred to the barge as a "vessel." *Lee v. Astoria Generating Co., L.P.*, 55 A.D.3d 124, 143 (1st Dept. 2008) (dissenting opinion) (Pet. App. B, 50a).

transportation because it had previously been moved long distances by tugboat, two of its sister barges had been moved to provide electricity to another location, and it could be used for that purpose again. It was registered with the U.S. Coast Guard.

Elliott and the defendants also argued that this case met all the criteria for maritime tort jurisdiction because Petitioner was injured on navigable water while repairing a watercraft, and that maintaining floating power stations was a traditional maritime activity.

The motion court dismissed the complaint, finding that the barge was a vessel and that Labor Law §§ 240(1) and 241(6) were preempted by section 905(b) of the LHWCA (Pet. App. C, 79a-83a). The motion court also held that there was no evidence of negligence to support a claim under Labor Law § 200 against the defendants (Pet. App. C, 83a-84a).

On appeal, the Appellate Division of the Supreme Court reversed that determination, holding as a matter of law that the barge was not a vessel, (Pet. App B, 30a-32a), and that the Labor Law would not be preempted even if it were (Pet. App. B, 36a-38a). The Appellate Division also granted Petitioner summary judgment on the issue of liability under Labor Law § 240(1), even though Petitioner had not requested that relief in his moving papers (Pet. App B. 32a-33a). One justice dissented, arguing that the barge met the *Stewart* criteria, and that the Labor Law was expressly preempted by section

905(b) of the LHWCA (Pet. App B, 39a-55a). All of the justices agreed that the common-law negligence claim under Labor Law § 200 was properly dismissed.

Elliott and the defendants appealed to the Court of Appeals with the permission of the Appellate Division. The Court of Appeals, in a 5-2 decision, reversed the order of the Appellate Division, and reinstated the order dismissing the complaint (Pet. App A, 20a), holding that the barge was a vessel as a matter of law under *Stewart*, and that section 905(b) of the LHWCA expressly preempted Labor Law §§ 240(1) and 241(6) (Pet. App. A, 8a-10a). The Court of Appeals also denied Petitioner's motion for reargument.

Misstatements in the Petitioner's Brief

The barge is not permanently moored, contrary to Petitioner's statements at Pet. Br. i and 24. The motion court took issue with Petitioner's previous statement to that effect. See Pet. App. C 77a. In 1975, a New York court described the manner in which the barges are moored to the pier as follows:

> The barges are connected to the pier by means of a series of so-called 'spud and clamp' fixtures, each of which essentially is a clamp on the barge which is designed to fit an H-shaped beam or spud on the pier. The clamp slides vertically along the beam in response to tidal variations and is self-tending. The barges are also connected by vari-

> ous auxiliary power and control wirings, gangways, telephone lines, feeder cables and associated equipment, supply pipes, etc. Con Ed's claim is uncontroverted that all connections can be severed and the barge can put to sea, if desired, in eight to twelve hours.

Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc.2d 1065, 1067 (Sup. Ct., Kings. Co. 1975).

In 1998, when a Con Edison employee was injured on one of the barges and applied for LHWCA benefits, the Benefits Review Board of the U.S. Dept. of Labor described the barges as follows:

> The facts involved in this case are not in dispute. Employer supplies electricity to consumers. In 1969, employer began to generate electricity from gas turbine powered generators located on barges at two sites along Upper New York Bay in Brooklyn, New York known as Gowanus and the Narrows. Each barge has two 12–ton spud beams which affix the barge to a pier by 10 stud bolts. The barges can be disengaged from the pier and transported by tugboat to dry dock for maintenance and repairs; moreover, the barges can be removed and transported by water to other locations to supply needed electricity to other parts of New York City.

Caserma v. Consolidated Edison, BRB No. 97-0770, 1998 WL 155555 (March 6, 1998).

There is no basis in the Record for Petitioner's statements that "the electrical generating station [sits] atop the floating platform and the rest of the Second Avenue facilities" (Pet. Br. 11) or that the "structure" consists of "two components, a barge and a power plant structure on top thereof" (Pet. Br. 13). Again, the court in *Consolidated Edison v. City of New York* described the barges as follows:

> Each barge is approximately 215 feet long, 79 feet wide and 12 feet deep with a superstructure rising at least 56 feet above the water line. Each barge houses eight gas turbine generators developing a total of 622,000 kilowatts, together with auxiliary equipment, associated apparatus and various connections with the shore. The electric power generated is transmitted by feeder cables suspended from 'take-off towers' leading to similar towers on the pier and then to the substation.

Consolidated Edison Co. of New York, Inc. v. City of New York, 80 Misc.2d at 1066, 365 N.Y.S.2d at 379.

It is also incorrect to say that "[t]estimony from the operator confirmed that the floating platforms were built for the sole purpose of supporting the power plants and they were never intended to operate as vessels in navigation." (Pet. Br. 8). To the contrary, the witness in question testified that his employer, Astoria/Orion, had no present plans to

move the barges, but probably would move them given sufficient economic justification. See also *Consolidated Edison Company of New York, Inc. v. City of New York*, 80 Misc.2d 1065, 1068 (Sup. Ct., Kings Co. 1975), in which Con Edison, as the owner of the power barges, argued that the barges were not specially adapted for the use of that particular substation, and that Con Edison never intended that the barges become part of its realty at that location. Indeed, the barges, but not the realty, were subsequently sold by Con Edison to Astoria/Orion (Pet. App. C, 57a-58a).

Petitioner repeatedly refers to the preservation of his state law claims by 33 U.S.C. § 933. See, e.g., Pet. Br. 9, 32. However, this Court has consistently interpreted § 933 to preserve federal maritime claims as well as state claims. See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, *supra*, 532 U.S. at 819, and cases cited. Section 933 of the LHWCA is not a mandate to apply state law to actions by covered employees against non-vessels.

REASONS FOR DENYING THE PETITION

THE COURT OF APPEALS' DECISION DOES NOT IMPLICATE ANY OF THE TRADITIONAL FACTORS THAT THE COURT ROUTINELY RELIES UPON IN GRANTING CERTIORARI

The Petition does not meet any of the criteria governing discretionary review in Rule 10 of this Court, which provides that:

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

A) The Petition should be denied because this case is simply a fact-specific application of *Stewart v. Dutra* by a state court

This Court's Rule 10 provides in part, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The decision of the New York Court of Appeals that *Gowanus Bay No. 1* is a vessel is a fact-specific application of this Court's decision in *Stewart v. Dutra Construction*, *supra*, which is consistent with the results reached in *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006), and *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008), and does not present any compelling reasons for review. Petitioner argues that the Court of Appeals misapplied the *Stewart* criteria; however, his contentions do not warrant review because he merely questions the Court of Appeals' application of the criteria set forth in this Court's decision.

Factors indicating that *Gowanus Bay No. 1* is a "vessel" include the fact that (a) it was built in a shipyard, (b) it floats, (c) it is not permanently moored, (d) it can be moved by tug boat to alternative locations, (e) its ability to provide emergency power to shoreside locations serves a maritime purpose, and (f) it is registered with the U.S. Coast Guard. As this Court held in *Stewart*, a "vessel" for purposes of the LHWCA "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment," and "[d]espite [any] seeming incongruity of grouping [the craft] alongside more traditional seafaring vessels." *Stewart, supra*, 543 U.S. at 497.

Contraindications include the fact that it is not self-propelled, it is not adapted for carrying cargo or passengers, and it has not moved from its pier except to dry dock for maintenance. *Stewart* teaches that these factors are not particularly relevant. Lack of propulsion and a special purpose do not prevent *Gowanus Bay No. 1* from being deemed a "vessel". *Stewart* and *Belle of Orleans* teach that, as long as the watercraft has not been permanently disabled from sailing, the present intentions of the owner are also not dispositive of the "vessel" issue.

In *Tagliere*, a casino patron who fell while playing a slot machine on a riverboat casino sued in federal court under its admiralty jurisdiction because she needed the three-year statute of limitations for tort claims. The district court dismissed

the complaint for lack of jurisdiction. The Seventh Circuit, construing the Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. § 740, held that an indefinitely moored casino was not "permanently moored" in the *Stewart* sense because there was no evidence that the casino had been disabled from sailing, and could therefore be a "vessel" for jurisdictional purposes.

In *Belle of Orleans*, the Eleventh Circuit held that an indefinitely moored, but fully operational, riverboat casino was a "vessel" for the purpose of establishing admiralty jurisdiction, even though its owners had informed the U.S. Coast Guard that they intended to operate in a continuously moored status. The court held that the apparent intent of the owners of a boat was not dispositive of whether the boat was a "vessel", because state laws and owners' intentions can change, and jurisdictional rules intended to be uniform should not be subject to such vagaries. *Belle of Orleans*, *supra*, 535 F.3d at 1311-1312.

Applied to the facts of this case, *Tagliere* teaches that *Gowanus Bay No. 1* has not been "permanently moored" because it has not been disabled from sailing. *Belle of Orleans* teaches that the owners' apparent intent to keep the power barges moored to the pier in Brooklyn does not cause them to lose their status as "vessels" capable of being used for marine transportation. Accordingly, there are no grounds to conclude that this case was wrongly decided, much less to find a compelling reason to review the decision of a state court on a properly

stated point of federal law. As noted in Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

B) The Petition should be denied because the Court of Appeals' decision does not conflict with relevant decisions of this Court or a United States Court of Appeals

Contrary to Petitioner's argument, this is not a case in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. Rule 10(b).

1) This case has nothing to do with casino boats in the Fifth Circuit

Petitioner argues that there is a conflict among the circuit courts concerning the vessel status of indefinitely moored riverboat casinos after *Stewart*, citing *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008); *DeLaRosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185 (5th Cir. 2006); and *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied*, 543 U.S. 942 (2004). This case, however, does not involve a riverboat casino and relates to that conflict only in the most general sense.

The Record in this case would not help this Court resolve the conflict among the Circuits concerning the "vessel" status of indefinitely moored riverboat casinos. As one distinguished commentator has pointed out, applying the *Stewart* test to riverboat casinos requires discrimination among different types of non-cruising casinos. David W. Robertson, "How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and other areas of Maritime Law", 39 J. Mar. L. & Com. 115, 131-32 (April 2008). Because this case does not involve a non-cruising casino, the Record contains no facts which would help this Court identify the factors that would enable courts to usefully discriminate among the different types of non-cruising casinos in the future. For instance, the Record in this case does not address one of the crucial factual issues in the casino boat cases because it does not establish whether the present owners of *Gowanus Bay No. 1* ever made a decision or stated their intention to "permanently moor" their four power barges, as did the owners of the *Belle of Orleans* when they informed the U.S. Coast Guard of their intentions. *Belle of Orleans*, *supra*, 535 F.3d at 1304.

In addition, the conflict between the Fifth and Eleventh Circuits is more apparent than real, and may only reflect the reluctance of the Fifth Circuit to extend admiralty jurisdiction to patrons and wait staff on casino boats. Compare *DeLaRosa v. St. Charles Gaming Co.*, *supra*, 474 F.3d at 187-88 (customer on non-cruising casino boat had no claim

under admiralty jurisdiction), to *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441 (5th Cir. 2006) (floating dormitory for dredging crew is a vessel for Jones Act purposes). The apparent conflict is not fully developed, and could resolve itself as courts in the Fifth Circuit begin to examine other prerequisites for qualifying for seaman status under the Jones Act such as whether the worker's connection to the vessel was substantial both in nature and duration, as this Court suggested in *Stewart*, 543 U.S. at 494-95.

Finally, certiorari should be denied because the Petitioner in this case would be making an argument to this Court that is contrary to the interests of most workers injured aboard watercraft on navigable waters. In most of the cases cited, the injured worker is asserting admiralty jurisdiction and seeking a jury trial under the Jones Act because the only remedy under state law is workers compensation. Such workers want floating casinos to be "vessels". In this case, Petitioner is seeking to avoid admiralty jurisdiction and "vessel" status because he wants the New York courts to apply local legislation which affords construction workers greater rights than most workers in New York and elsewhere. A victory for Petitioner concerning the vessel status of indefinitely moored watercraft would be a setback for most amphibious workers in this country.

2) Petitioner's claim against Astoria/Orion is within the admiralty jurisdiction

Petitioner's second argument is essentially that the New York courts erred in failing to expressly hold that his case was within the admiralty jurisdiction of the federal courts. Citing *McLaurin v. Noble Drilling (US) Inc.*, 529 F.3d 285 (5th Cir. 2008), he argues that he should be permitted by 33 U.S.C. § 933 to bring an action against Astoria/Orion based on state law even if the barge is a "vessel" because his claim against the vessel was not a *maritime* tort. *McLaurin*, 529 F.3d at 289-90.

The New York Court of Appeals (Pet. App. A, 7a) and the dissenting justice at the Appellate Division (Pet. App. B, 49a) found it unnecessary to decide whether Petitioner's claims satisfied the status test for admiralty jurisdiction because his claim was indisputably covered by the LHWCA, and his claim against Astoria/Orion, the owner of the "vessel", was indisputably covered by 33 U.S.C. § 905(b).

According to *McLaurin* and *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1264 (5th Cir. 1986), the New York Court of Appeals omitted a step from its analysis. It should first have determined whether Petitioner's claim against the "vessel" met the tests for maritime tort jurisdiction before deciding whether Petitioner's claim against Astoria/Orion was covered by § 905(b). The plaintiffs in *McLaurin* and *May* were injured on land (Pet. Br. 31 n 7), unlike Petitioner in this case and, there-

fore, their tort claims did not satisfy the situs requirement for admiralty jurisdiction.

The apparent oversight is immaterial, and does not provide a compelling reason for this Court to grant review because Petitioner's claim is clearly within the admiralty jurisdiction. As this Court has stated, it reviews "judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956).

Petitioner's claim meets the situs test for admiralty jurisdiction because he was physically on actual navigable water when he was allegedly injured. *See Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 416 (2d Cir. 2005) ("a person on any object floating in actual navigable waters must be considered to be on actual navigable waters").

Petitioner's claim meets the status test because he was overhauling one of the gas turbines on the barge when he was allegedly injured. Ship repair is certainly a maritime activity, because it is one of the core activities defining the term "harbor worker" under the LHWCA. 33 U.S.C. §§ 902(3) and 905(b). Federal circuit courts have held that workers repairing or installing machinery on ships are engaged in traditional maritime activity for jurisdictional purposes. See *Martinez v. Pacific Indus. Service Corp.*, 904 F.2d 521, 524 (9th Cir. 1990) ("Cleaning the boilers of a ship is a traditional maritime activity. The fact that it is now done by hydroblast does not alter its essential character.");

Alderman v. Pacific Northern Victor, Inc., 95 F.3d 1061, 1064 (11th Cir. 1996) (carpenter installing an elevator during a ship conversion was engaged in maritime activity even though he alleged he was merely a "construction worker").

In addition, Petitioner established his claim for benefits under the LHWCA by showing that his presence aboard the barge was neither transient nor fortuitous. That showing alone may be sufficient to meet the status test for admiralty jurisdiction. *See Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251, 254 (5th Cir. 2007) (injured carpenter met the situs and status tests for LHWCA coverage because the presence of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous).

Accordingly, Petitioner's claims satisfy both the situs and status tests for maritime tort jurisdiction, and the Court of Appeals did not err in holding that the maritime law applied to his case. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

3) Petitioner's negligence claim was dismissed on state law grounds

Petitioner's final argument (Pet Br. 32-35) does not provide appropriate grounds for review by this Court because the New York state courts have already dismissed Petitioner's cause of action for common-law negligence (Labor Law § 200) against the owner of *Gowanus Bay No. 1* based on the very

same state law standards he seeks to import into 33 U.S.C. § 905(b) (Pet. App. C, 83a-84a). In *O'Hara v. Weeks Marine, supra*, the Second Circuit expressly noted the similarity between Labor Law § 200 and 33 U.S.C. § 905(b). There is no reason to think that the New York courts would view Petitioner's negligence claim differently following review by this Court.

C) The Petition should be denied because the Court of Appeals avoided the real issue in this case

The real issue in this case is not whether *Gowanus Bay No. 1* is a "vessel" under 1 U.S.C. § 3 and *Stewart*. The real issue is whether state liability standards in general, and New York Labor Law §§ 240 and 241 in particular, may ever be applied to a workplace accident on navigable water. The New York Court of Appeals held in *Cammon v. City of New York*, 95 N.Y.2d 583 (2000) that the general maritime law does not preempt New York Labor Law §§ 240(1) and 241(6) in such a case. It distinguished *Cammon* from the facts of this case because Petitioner was injured on a "vessel" and therefore, his claim was governed by a federal statute, 33 U.S.C. § 905(b), which expressly preempted all other remedies (Pet. App. A, 9a-10a).

Cammon conflicts with decisions of this Court and the United States courts of appeals. See *Yamaha Motor Corporation U.S.A. v. Calhoun*, 516 U.S. 199, 216 n 14 (1996), in which this Court noted that the standards governing liability in maritime tort

cases had to be distinguished from the rules on remedies, and the Third Circuit held, following remand, that federal standards should govern liability. *Calhoun v. Yamaha Motor Corporation, U.S.A.*, 216 F.3d 338, 351 (2000), *cert. denied*, 531 U.S. 1037 (2000). More to the point, this Court has already held that the New York Labor Law has no application in a negligence action brought by a ship repairer who fell from a broken plank scaffold into the hold of a ship, *Robins Dry Dock & Repair Co. v. Dahl, supra*, 266 U.S. at 449, but the New York Court of Appeals in *Cammon* ignored *Dahl*, evidently believing that decisions from the *Lochner* era are no longer binding precedent.[4] However, *Dahl* was a unanimous decision of this Court and deserves greater respect than either *Lochner v. New York*, 198 U.S. 45 (1905), or *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which Justice Stevens criticized in a concurring opinion in *American Dredging Co. v. Miller*, 510 U.S. 443, 458-59 (1994).

The issue whether the general maritime law impliedly preempts claims under Labor Law §§ 240 and 241 should not be reviewed in this case, however, because the New York Court of Appeals avoided it by holding that 33 U.S.C. § 905(b) expressly preempted Petitioner's state law claims and reached the right result. The parties have also largely avoided it by focusing their arguments on "vessel" status, admiralty jurisdiction, and the

[4] *See Gravatt v. City of New York*, 1998 WL 171491 (S.D.N.Y. 1998) (cited in *Cammon, supra*, 95 N.Y.2d at 590 and 595).

LHWCA. The broader issues under the general maritime law should be reviewed in the broader context in which they usually arise in New York, *i.e.*, an action by a covered employee under 33 U.S.C. § 933 against a non-vessel contractor or riparian owner in which it is unclear whether state or federal law should apply. Numerous opportunities will arise. *See, e.g., O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Vasquez v. GMD Shipyard Corp.*, 582 F.3d 293 (2d Cir. 2009).

Should this Court decide to grant the Petition in this case, it should direct the parties to brief the issue whether *Cammon v. City of New York, supra*, which has been criticized, was correctly decided.[5]

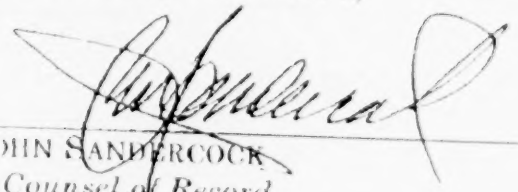
[5] *See, e.g.*, Raymond C. Green, "Federal General Maritime Law or State Law. Which Rules in Marine Construction Workers' Tort Actions Against Third Parties", 3 Benedict's Mar. Bull. 289 (3d Quarter 2005).

CONCLUSION

Petitioner has not provided this Court with any compelling reasons to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Dated: New York, New York
July 23rd, 2010

Respectfully submitted,



JOHN SANDERCOCK
Counsel of Record
CURT J. SCHINER
STEVEN B. PRYSTOWSKY
LESTER SCHWAB KATZ & DWYER, LLP
120 Broadway
New York, New York 10271
212-964-6611
jsandercock@lskdnylaw.com

Counsel for Respondent
Elliott Turbomachinery Co., Inc.

JUL 25 2013

No. 09-1567

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

v.

ASTORIA GENERATING COMPANY, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS ASTORIA GENERATING COMPANY, L.P., ORION POWER NEW YORK GP, INC., ORION POWER NEW YORK, L.P., AND ORION POWER NEW YORK LP, LLC

BARBARA D. GOLDBERG
MAURO GOLDBERG & LILLING LLP
60 Cutter Mill Road, Suite 200
Great Neck, New York 11021
(516) 487-5800
BDGoldberg@mgllappeals.com

Counsel for Respondents Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC

231301

COCKLE PRESS
(800) 274-3321 • (800) 359-6859

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Has Petitioner presented compelling reasons to grant the Petition, where the determination of the New York Court of Appeals is a fact-specific application of the definition of "vessel" set forth by this Court in *Stewart v. Dutra Construction Co.*?

II. Has Petitioner presented compelling reasons to grant the Petition, where the Record before the New York State courts would provide no guidance to this Court in resolving a purported conflict among the Fifth, Seventh and Eleventh Circuits as to whether indefinitely-moored riverboat casinos are "vessels" under *Stewart*?

III. Has Petitioner presented compelling reasons to grant the Petition, where the state court determination that strict and vicarious liability claims against a vessel owner are preempted by the federal Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. § 901 *et seq.*) is consistent with established law, and avoids the issue of whether the general maritime law impliedly preempts New York Labor Law §§ 240(1) and 241(6) in all cases involving accidents to construction workers on navigable waters?

IV. Has Petitioner presented compelling reasons to grant the Petition, where the New York State courts have already dismissed his cause of action for common-law negligence based on the same state law standards pursuant to which he seeks to assert a negligence claim under 33 U.S.C. § 905(b)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Orion Power New York, L.P. ("OPNY"), a Delaware limited partnership, is an indirect, wholly-owned subsidiary of RRI Energy, Inc. (formerly knows as "Reliant Energy, Inc.") OPNY's general partner is Orion Power New York GP, Inc., a Delaware corporation ("OPNYG"), and its limited partner is Orion Power New York LP, LLC, a Delaware limited liability company ("OPNYL"). OPNYG owns a 0.2% general partnership interest and OPNYL owns a 99.8% limited partnership interest in OPNY. OPNYG and OPNYL are each direct, wholly-owned subsidiaries of Orion Power Holdings, Inc., a Delaware corporation. That entity is a direct, wholly-owned subsidiary of RRI Energy, Inc., a Delaware corporation.

Astoria Generating Company, L.P. ("Astoria") was an indirect, wholly-owned subsidiary of RRI Energy, Inc., until February 23, 2006, when it was sold to Astoria Generating Company Acquisitions, L.L.C. At the time of the sale, OPNYG was Astoria's general partner and OPNY was its limited partner. OPNYG owned a 1% general partnership interest in Astoria and OPNY owned a 99% limited partnership interest.

RRI Energy, Inc.'s other subsidiaries are listed below. Each is wholly-owned by RRI Energy, Inc., either directly or indirectly unless otherwise noted.

Conemaugh Fuels, LLC[1]

Keystone Fuels, LLC[2]

Orion Power Midwest GP, Inc.

Orion Power Midwest LP, LLC

Orion Power Midwest, L.P.

Orion Power Operating Services MidWest, Inc.

RRI Energy Asset Management, LLC

RRI Energy Broadband, Inc.

RRI Energy California Holdings, LLC

RRI Energy Channelview (Delaware) LLC

RRI Energy Channelview (Texas) LLC

---

1. RRI Energy Key/Con Fuels, LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of RRI Energy, Inc., owns a 16.45% membership interest in Conemaugh Fuels, LLC. There are seven other non-Reliant members that individually hold varying percentages of the remainder of Conemaugh Fuels, LLC's, membership interests.

2. Reliant Energy Key/Con Fuels, LLC, a Delaware limited liability company and an indirect, wholly owned subsidiary of Reliant Energy, Inc., owns a 16.67% membership interest in Keystone Fuels, LLC. There are six other non-Reliant members that individually hold varying percentages of the remainder of Keystone Fuels, LLC's membership interests.

RRI Energy Channelview LP

RRI Energy Communications, Inc.

RRI Energy Corporate Services, LLC

Reliant Energy Florida, LLC

RRI Energy Key/Con Fuels, LLC

RRI Energy Mid-Atlantic Power Holdings, LLC

RRI Energy Mid-Atlantic Power Services, Inc.

RRI Energy Northeast Generation, Inc.

RRI Energy Northeast Holdings, Inc.

RRI Energy Northeast Management Company

RRI Energy West, Inc.

RRI Energy Power Generation, Inc.

RRI Energy Sabine (Delaware), Inc.

RRI Energy Sabine (Texas), Inc.

RRI Energy Services Channelview LLC

Reliant Energy Services Desert Basin, LLC

RRI Energy Services, Inc.

RRI Energy Solutions East, LLC

RRI Energy Trading Exchange, Inc.

RRI Energy Ventures, Inc.

RRI Energy Wholesale Generation, LLC

Sabine Cogen, LP

San Gabriel Power Generation, LLC

RRI Energy, Inc., does not have any affiliates, as neither it nor any of its subsidiaries owns 10% or more of the issued and outstanding equity of any entity other than those listed above.

RRI Energy, Inc., is the sole member of the three Texas non profit corporations listed below. These entities are not considered subsidiaries or affiliates, however, because they do not issue stock or declare dividends:

RRI Energy Foundation

RRI Energy, Inc. Political Action Committee

RRI Energy, Inc. Texas Political Action Committee

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	vii
TABLE OF CITED AUTHORITIES	x
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Factual Background	3
The Gowanus Barges	3
The Underlying Accident	5
Petitioner Claimed That He Was A "Maritime Worker" Under The LHWCA	6
B. Proceedings Below	7
The Summary Judgment Motions	8
Petitioner's Opposition To The Motions	9

Contents

Page

The Reply 9

The Motion Court's Decision 10

The Appellate Division Decision 11

The New York Court Of Appeals Decision .. 13

REASONS FOR DENYING THE PETITION ... 14

I. THE CASE INVOLVES A FACT-SPECIFIC APPLICATION OF THE *STEWART* DEFINITION 14

II. CERTIORARI SHOULD NOT BE GRANTED HERE TO RESOLVE A PURPORTED CONFLICT IN THE CIRCUITS AS TO THE VESSEL STATUS OF RIVERBOAT CASINOS .. 19

III. SINCE THE PETITIONER'S CLAIM IS CLEARLY SUBJECT TO MARITIME JURISDICTION, THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S STRICT AND VICARIOUS LIABILITY CLAIMS AGAINST ASTORIA/ORION WERE PREEMPTED 22

Page

The Claim Satisfies The "Situs" And "Status" Tests For Maritime Jurisdiction 22

The Court Of Appeals Properly Determined That Petitioner's Strict And Vicarious Liability Claims Against Astoria/Orion Were Preempted 24

IV. PETITIONER'S NEGLIGENCE CLAIM WAS DISMISSED ON STATE LAW GROUNDS, AND THE RECORD PROVIDES NO BASIS FOR FINDING A BREACH OF THE *"SCINDIA"* DUTIES 27

CONCLUSION 29

TABLE OF CITED AUTHORITIES

CASES

Page

Alderman v. Pacific Northern Victor, Inc.,
95 F.3d 1061 (11th Cir. 1996) 23

Anaya v. Traylor Brothers, Inc.,
478 F.3d 251 (5th Cir. 2007) 23

Anderson v. United States,
317 F.3d 1235 (11th Cir. 2003) 23

Board of Commissioners of the Orleans Levee District v. M.V. Belle of Orleans,
535 F.3d 1299 (11th Cir. 2008) ..... *passim*

Bunch v. Canton Marine Towing Co.,
419 F.3d 868 (8th Cir. 2005) 16

Calcaterra v. City of N.Y.,
45 A.D.3d 270 (N.Y. App. Div. 2007) 16

Cammon v. City of New York,
95 N.Y.2d 583 (2000), *rearg. denied*
96 N.Y.2d 793 (2001) 13, 24, 27

Caserma v. Consolidated Edison Co.,
BRB No. 97-0770 (March 6, 1998), 32 BRBS
25 (1998) 7

Consolidated Edison Co. v. City of New York,
44 N.Y.2d 536 (1978) 4

Cited Authorities

Page

Cope v. Vallette Dry-Dock Co.,
119 U.S. 625 (1887) 18

De La Rosa v. St. Charles Gaming Co., Inc.,
474 F.3d 185 (5th Cir. 2006) 17, 19, 20

Director, OWCP v. Perini North River Associates,
459 U.S. 297 (1983) 7, 24

Emanuel v. Sheridan Transp. Corp.,
10 A.D.3d 46 (N.Y. App. Div. 2004) 24-25, 28

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.,
271 U.S.19 (1926) 18

Holmes v. Atl. Sounding Co.,
437 F.3d 441 (5th Cir. 2006) 16

Howard v. S. Ill. Riverboat Casino Cruises, Inc.,
364 F.3d 854 (7th Cir. 2004), *cert. denied*,
543 U.S. 942 (2004) 17, 19

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995) 23

Kathriner v. UNISEA, Inc.,
975 F.2d 657 (9th Cir. 1992) 18

Cited Authorities

Page

Lee v. Elliott Turbomachinery,
BRB No. 02-0761 (July 23, 2003)
(unpublished decision) 5

McLaurin v. Noble Drilling (US) Inc.,
529 F.3d 285 (5th Cir. 2008) 22

Norfolk Shipbuilding & Drydock Corp. v. Garris,
532 U.S. 811 (2001) 26

Pavone v. Mississippi Riverboat Amusement Corp.,
52 F.3d 560 (5th Cir. 1995) 11-12, 17

Rigopoulos v. State of N.Y.,
236 A.D.2d 459 (N.Y. App. Div. 1997) 25

Roper v. United States,
368 U.S. 20 (1961) 17

Scindia Steam Nav. Co. v. De Los Santos,
451 U.S. 156 (1981) 25, 27, 28

Scott v. Trump Indiana, Inc.,
337 F.3d 939 (7th Cir. 2003) 23

Stewart v. Dutra Construction Co.,
543 U.S. 481 (2005) ..... *passim*

Cited Authorities

Page

Sutherland v. City of N.Y.,
266 A.D.2d 373 (N.Y. App. Div. 1999) 25

Tagliere v. Harrah's Illinois Corp.,
445 F.3d 1012 (7th Cir. 2006) 16

Tibak v. City of New York,
154 A.D.2d 313 (N.Y. App. Div. 1989),
lv. denied, 75 N.Y.2d 705 25

Tompkins v. Port of New York Authority,
217 A.D.2d 269 (N.Y. App. Div. 1996) 25

Uzdavines v. Weeks Marine, Inc.,
418 F.3d 138 (2nd Cir. 2005) 16

West v. United States,
361 U.S. 118 (1959) 17

STATUTES

1 U.S.C. § 3 ..... 1, 15

33 U.S.C. § 901 i

33 U.S.C. § 902(3) 7, 23

33 U.S.C. § 905(b) ..... *passim*

46 U.S.C. § 763(a) 6

Cited Authorities

Page

46 U.S.C. § 30104(a) 2

New York Labor Law § 200 ..... 7, 12, 27

New York Labor Law § 240(1) ..... *passim*

New York Labor Law § 241(6) ..... *passim*

INTRODUCTION

In *Stewart v. Dutra Construction Co.* (543 U.S. 481 [2005]), this Court held that, for purposes of the LHWCA, the term "vessel" includes "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (*id.*; *see also* 1 U.S.C. § 3). Applying that definition, the New York Court of Appeals properly held that the barge, Gowanus Bay No. 1, where Petitioner was working at the time of his alleged injury, is a vessel, and that accordingly, § 905(b) of the LHWCA preempts state law claims that would otherwise impose strict and vicarious liability on the vessel owner.

The determination of the Court of Appeals does not conflict with a decision of this or any other court, but even if it did so, certiorari would not be warranted. The conclusion that Gowanus Bay No. 1 is a vessel represents a fact-specific application of the *Stewart* criteria. As such, it does not present any compelling reasons for review by this Court. As stated in this Court's Rule 10, certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

There is likewise no merit to Petitioner's further argument that to grant certiorari in this case would somehow assist the Court in resolving an apparent conflict among the Fifth, Seventh and Eleventh Circuits concerning the application of the *Stewart* criteria to indefinitely moored riverboat casinos. Assuming that such a conflict exists, the Record in this case contains

no facts that would enable this Court to resolve it. These cases typically raise the issue of whether casino staff such as waiters and bartenders are "seamen" on a "vessel in navigation" for purposes of the Jones Act (46 U.S.C. § 30104[a]), and as such, are entirely dissimilar from the instant case, which does not present the issue of whether Gowanus Bay No. 1 was a vessel "in navigation."

Nor does the determination by the Court of Appeals that Petitioner's state law strict and vicarious liability claims were preempted by the LHWCA provide a compelling reason for granting certiorari. Petitioner's contention that even if the barge is a "vessel," he could assert such claims under the "maritime but local" rule is without merit. The case satisfies the "situs" requirement for maritime jurisdiction, inasmuch as it is uncontested that Petitioner was working on navigable waters when he was allegedly injured. The "status" requirement is likewise satisfied, since Petitioner was engaged in a traditional maritime activity—repair of a turbine on a vessel—when he was allegedly injured. Moreover, since the Court of Appeals relied on 33 U.S.C. § 905(b) in holding that Petitioner's state law claims were preempted, the case does not raise the broader issue of whether the general maritime law impliedly preempts strict and vicarious liability claims by construction workers injured on navigable waters, and accordingly certiorari should not be granted to address that issue.

Finally, Petitioner's negligence argument must be rejected since the New York State Courts have already dismissed his cause of action for common-law negligence

based on the same state law standards on which he seeks to base a claim for vessel negligence under 33 U.S.C. § 905(b).

STATEMENT OF THE CASE

A. Factual Background

The Gowanus Barges

The Gowanus Power Generating Facility, in Upper New York Bay, is a floating gas and oil turbine power generating station. In April 2001, when Petitioner alleges that he was injured, it was owned and operated by Astoria Generating Company, L.P., Orion Power New York, G.P., Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC ("Astoria/Orion"). This facility, originally owned by Consolidated Edison Company ("Con Ed"), consists of four barges, each with eight turbine units. Gowanus Bay No. 1, the barge where Petitioner was working, is a steel vessel of 1,829 gross tons. It is approximately 215 feet long and 80 feet wide, with a hull depth of eleven feet. The turbines on the barge are approximately ten feet wide and 50 feet long and are encased in rectangular exhaust wells made of half-inch metal plates. At the top of each well is an opening called a "stack hatch" or a "sniffer," some 15 feet above the catwalk surrounding the turbine.

In a 1978 case concerning the tax status of the power plant, the New York Court of Appeals explained that:

> Each barge is connected to the pier by a "spud and clamp" design system which allows for

> vertical movement with tidal variations and for linear movement with the wind, waves, and the wash from passing vessels. Each has two clamps that fit two spuds (designed as an H-shaped beam and connected to the mooring by bolts) in such manner as to be capable of movement along the H-shaped beam. Con Ed's claim is uncontroverted that all connections can be severed and the barge can put to sea, if desired, in 8 to 12 hours.

(*Consolidated Edison Co. v. City of New York*, 44 N.Y.2d 536, 539 [1978]).

The barges rise and fall with the tides, and although they rock back and forth during high winds, they are designed to withstand 100 miles plus per hour hurricane force winds. The barges have multiple telephone lines and "start lines" that allow Con Ed to start the units by remote control when it buys power generated at the Gowanus facility. Contrary to Petitioner's contention that they are "permanently moored," the barges are not permanently fixed to the bottom of the bay or to the shore, but can be disconnected and moved to dry dock for maintenance. This is done "between every eight and ten years, or on an as-needed basis." Additionally, the barges can, and have, been moved to other locations to supply electricity where needed. In 1996, for example, when a boiler in Astoria, New York exploded, two of the barges were moved there for about three months. Since then, the barges have remained at their present location in large part because demand in the area for the power provided by the barges has remained strong. The barges can and probably would be moved from their present

location if a worthwhile opportunity arose. The barges, which are registered as vessels with the Coast Guard, are accessible only by gangplanks, and contain Coast Guard mandated life-saving equipment (life rings).

The turbines on the barges undergo routine maintenance, described as "a major overhaul," every 10,000 service hours. In 2001, Third-Party Defendants-Respondents Elliott Turbomachinery Co., Inc. and Elliott Company ("Elliott") contracted with Astoria/Orion to perform such maintenance.

The Underlying Accident

Petitioner, who worked for Elliott as a millwright, was injured on April 16, 2001, while working on turbine 2 on Gowanus Bay No. 1. He claims that he aggravated a pre-existing back condition when he fell while attempting to reach the turbine by climbing down through the stack hatch at the top of the exhaust well surrounding it. Ordinarily workers gain access to the turbines through holes cut in the side of the exhaust well that are later re-welded shut. Such a hole had been welded shut on turbine 2 the day before Petitioner's accident.

Petitioner sought and received compensation under the LHWCA in 2003 (*see Lee v. Elliott Turbomachinery*, BRB No. 02-0761 [July 23, 2003] [unpublished decision]). That same year, he commenced this action against Astoria/Orion, alleging that it violated §§ 200, 240(1) and 241(6) of the New York State Labor Law. He did not assert a negligence claim under § 905(b) of the LHWCA, and the time to do so pursuant to the three year statute

of limitations applicable to maritime torts (46 U.S.C. § 763[a]) has since expired. Astoria/Orion, in turn, brought a third-party action seeking indemnification from Elliott.

Petitioner Claimed That He Was A "Maritime Worker" Under The LHWCA

At his hearing before the United States Department of Labor ("Department of Labor"), to support his claim that he was a maritime worker for purposes of obtaining compensation under the federal LHWCA, Petitioner argued that the work in which he was engaged was not "land-based," and that his presence on the barge was not "fortuitous" or "transient." Petitioner further argued:

> Working on the barges, he was subjected to a certain element of danger which comes with working on the water. He's got to climb, he's got to carry heavy equipment and the barge rocks and moves with the wind and the tide. That is exactly why we have the [LHWCA].

The parties stipulated that the Gowanus Bay was a navigable waterway. At the Department of Labor hearing, Petitioner's counsel produced a United States Coast Guard vessel information sheet that "refer[red] to a vessel Gowanus Bay No. 1," the barge on which Petitioner was injured, and provided a Coast Guard vessel identification number for the barge. A witness for Astoria/Orion testified that the barge could be moved to supply emergency power if it were economically feasible.

In affirming the decision for Petitioner, the BRB relied in part on its decision in *Caserma v. Consolidated Edison Co.* (BRB No. 97-0770 [March 6, 1998], 32 BRBS 25 [1998]), which held that the barges are floating structures not permanently affixed to land, and that a mechanic who was injured while working on one of the barges at the Gowanus facility satisfied the "situs and status" requirements of the LHWCA, under the standard articulated in *Director, OWCP v. Perini North River Associates* (459 U.S. 297 [1983]). The BRB reasoned that pursuant to *Perini*, when a worker is injured on actual navigable waters in the course of employment on those waters, he or she is a maritime employee under the LHWCA. The LHWCA defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker" (33 U.S.C. § 902[3]).

B. Proceedings Below

Notwithstanding his receipt of benefits under the LHWCA, and the availability of a claim for active negligence against a vessel owner under the LHWCA, Petitioner commenced a state court tort action against Astoria/Orion, alleging that it had violated New York State Labor Law §§ 200, 240(1) and 241(6).[3] Astoria/Orion

3. Section 200 of the Labor Law codifies the common-law duty to provide a safe place to work. Section 240(1), sometimes referred to as the "Scaffold Law," imposes strict liability on owners and general contractors for injuries to construction

(Cont'd)

commenced a third-party action against Elliott claiming common law as well as contractual indemnification rights. Although he had successfully argued before the Department of Labor that his work was not "land-based," in order to recover under state law, Petitioner took the opposite position and contended that maritime law did not apply.

The Summary Judgment Motions

Elliott and Astoria/Orion moved for summary judgment dismissing the complaint and third-party action, arguing that: (1) a "vessel" cannot seek indemnification under the LHWCA; (2) as Petitioner's employer, Elliott was immune from liability under the New York State Workers' Compensation Law; and (3) Petitioner's Labor Law § 240(1) and § 241(6) claims were expressly preempted by 33 U.S.C. § 905(b). Elliott and

---

(Cont'd)

workers resulting from elevation-related risks. Section 241(6), in turn, imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers engaged in construction, excavation, or demolition work. As such, §§ 240(1) and 241(6) closely resemble the "warranty of seaworthiness" which formerly imposed strict liability upon shipowners for injuries to longshore and harbor workers. The warranty of seaworthiness was abolished by amendments to the LHWCA enacted in 1972, including 33 U.S.C. § 905(b). Section 905(b) provides that a covered employee may bring an action for the negligence of a vessel, and that "[t]he remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act." In contrast to the strict liability provisions of Labor Law § 240(1), comparative negligence is a defense to an action under § 905(b).

Astoria/Orion also argued that the court need not reach the issue of preemption with respect to the § 241(6) claim, since Petitioner was not engaged in construction, excavation or demolition work, so that § 241(6) would be inapplicable in any event; and that § 240(1) was inapplicable because Petitioner's decision to climb down the hatch without a ladder was the "sole proximate cause" of his alleged injury. With respect to the Labor Law § 200 claim, Elliott and Astoria/Orion argued that it was undisputed that Petitioner received no instruction or supervision from anyone other than employees of Elliott; that Astoria/Orion played no supervisory role in the work done by Elliott's employees; and that there was no evidence of negligence on Astoria/Orion's part, thereby precluding a claim under Labor Law § 200.

Petitioner's Opposition To The Motions

In opposition, Petitioner contended that state law was not preempted by the LHWCA, since the barge was not a vessel in navigation; work being done near navigable waters does not create admiralty jurisdiction; and Petitioner's receipt of LHWCA benefits did not preclude his claims against a non-vessel property owner. In addition, Petitioner argued that state law could be imported into federal admiralty law under the "maritime but local" rule.

The Reply

In reply, Elliott argued that Gowanus Bay No. 1 satisfied the *Stewart* definition of "vessel," since it was not permanently moored and was capable of being used

to transport its generators over water; and that maritime jurisdiction was appropriate because the accident occurred on navigable waters and Petitioner was engaged in maritime activity.

The Motion Court's Decision

The Supreme Court, New York County ("motion court") dismissed the complaint and third-party complaint, holding that the barge was a "vessel" under this Court's decision in *Stewart*, and that the Labor Law §§ 240(1) and 241(6) claims were preempted by 33 U.S.C. § 905(b) (Pet. App. 83a-84a). The court held, "upon a plain reading of the statute and case law, it is apparent to the Court that § 905(b) expressly preempts all causes of action against a vessel owner except those brought pursuant to § 905(b) in negligence" (Pet. App. 80a).

Of particular importance to the motion court were the 1972 amendments to the LHWCA, which eliminated the warranty of seaworthiness. The court determined that inasmuch as Labor Law § 240(1) is a strict liability statute, it conflicts with the LHWCA. The court further held that § 241(6) was similarly preempted, concluding that "applying the Labor Law to the instant case would place strict liability for the safety [*sic*] on the vessel owner, Astoria/Orion, rather than on the employer, Elliott, in direct contradiction to the intent of Congress" (Pet. App. 83a).

Finally, the court dismissed the claim pursuant to Labor Law § 200, which codifies the common-law duty imposed on an owner or general contractor to provide

construction workers with a safe work site. The court reasoned as follows:

> The record clearly demonstrates that Astoria/Orion did not exercise any supervision or control of the methods or materials of Plaintiff's work. The record indicates that Plaintiff only received instruction from Elliott's personnel.
>
> The Court also notes that the Complaint also fails to assert a cause of action for negligence against Astoria/Orion pursuant to section 905(b), or that said defendant violated any of the duties imposed upon vessel owners, such as the turnover duty, the active control duty, or the duty to warn. Finally, Plaintiff's "maritime but local" argument is insufficient. Having failed to allege a claim of negligence in accordance with the LHWCA, and upon dismissal of Plaintiff's Labor Law claims, the Plaintiff's complaint is dismissed in its entirety (Pet. App. 84a).

The Appellate Division Decision

Petitioner appealed, and a majority at the Appellate Division of the Supreme Court held that Gowanus Bay No. 1 was not a vessel (Pet. App. 30a), and that, accordingly, Petitioner's Labor Law §§ 240(1) and 241(6) claims were not precluded by the LHWCA (Pet. App. 32a). The majority relied primarily upon *Pavone v. Mississippi Riverboat Amusement Corp.* (52 F.3d 560

[5th Cir. 1995]), which held that two employees injured on the *Biloxi Belle*, a "floating dockside casino," were not covered by the Jones Act or maritime law.

Alternatively, the majority held that even if the barge were a vessel, federal maritime jurisdiction would not preempt the state Labor Law claims (Pet. App. 36a), on the theory that the tort was "maritime but local" (Pet. App. 37a-38a). After searching the record, the court also granted Petitioner partial summary judgment on liability under § 240(1), even though Petitioner had not requested such relief (Pet. App. 32a). The court, however, affirmed the dismissal of the Labor Law § 200 claim, holding that the motion court was "correct" in finding that Astoria/Orion did not have the supervisory control over the injury-producing activity necessary to support a finding of liability for common-law negligence or under Labor Law § 200 (Pet. App. 35a).

One justice dissented, arguing that the Gowanus barges were indeed vessels under *Stewart*, and that this Court in *Stewart* had previously recognized that § 905(b) "expressly preempts causes of action against a vessel owner on grounds other than negligence," such as the strict liability claims asserted by Petitioner against Astoria/Orion (Pet. App. 39a). The dissent concluded that as there was no evidence that the Petitioner's injuries were caused by any negligent conduct on the part of Astoria/Orion, the imposition of vicarious liability "poses a stark conflict with the exclusivity provision of 33 U.S.C. § 905(b)," and is foreclosed by the LHWCA (Pet. App. 44a).

The New York Court Of Appeals Decision

Astoria/Orion and Elliott appealed with the permission of the Appellate Division, and the New York Court of Appeals, in a 5-2 decision, reversed the order of the Appellate Division and reinstated the motion court's order (Pet. App. 10a), holding that the barge was a "vessel" for purposes of the LHWCA and that the Labor Law §§ 240(1) and 241(6) claims were preempted by the LHWCA. The Court reasoned that the LHWCA specifically permits an injured person covered under the LHWCA to bring an action in negligence against a vessel but also provides that this is to be exclusive of all other remedies against the vessel except remedies available under the Act (Pet. App. 7a). The court relied extensively upon *Stewart* in determining that Gowanus Bay No. 1 was, in fact, a "vessel," noting that this Court had provided "detailed guidance concerning the definition and characteristics of a vessel" (Pet. App. 7a).

In addition, the Court of Appeals addressed its prior decision in *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *reargument denied* 96 N.Y.2d 793 [2001]), upon which the majority at the Appellate Division had relied in holding that even if the barge were a vessel, the state Labor Law claims would not be preempted. The court stated that *Cammon* "does not support the premise that New York's Labor Law is not preempted by section 905(b)" (Pet. App. 9a), pointing out that unlike this case, *Cammon* did not involve § 905(b) or a vessel owner (Pet. App. 9a). Rather, *Cammon* involved a defendant *landowner* and an injured worker who received benefits under the LHWCA. The Court of Appeals in *Cammon* concluded that, under the particular circumstances of

that case, where the plaintiff was engaged in a "local, land-based repair" (repairing the fendering system of a city-owned pier), federal maritime law did not preempt strict liability claims under Labor Law § 240(1).

The two dissenting judges agreed that the Gowanus barge was a "vessel," but concluded that § 905(b) of the LHWCA did not preempt the state law claims (Pet. App. 11a) since, in their opinion, the Petitioner's tort claim did not satisfy the "status" test for a maritime tort (Pet. App. 16a).

REASONS FOR DENYING THE PETITION

I. THE CASE INVOLVES A FACT-SPECIFIC APPLICATION OF THE *STEWART* DEFINITION

The New York Court of Appeals held, as a matter of law, that Gowanus Bay No. 1, located on navigable waters in the Gowanus Bay, is a vessel within the LHWCA. This represents a fact-specific and appropriate application of the *Stewart* definition, and provides no compelling reason for granting certiorari. Significantly, under *Stewart*, it is a watercraft's *potential*, rather than its *actual*, use that is dispositive: "Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose" (543 U.S. at 495).

Here, the Gowanus barges not only have the potential ability to be used as a means of transporting their electrical power generating turbines over water,

but two of them have actually been used for that purpose. Other indicia of vessel status include the fact that the barges were built in a shipyard; they can be used to provide emergency power to shoreside locations, which serves a maritime purpose; they are accessible only by gangplanks; they are registered with the United States Coast Guard as vessels; and they contain safety equipment (life-saving rings) required by the Coast Guard. Unlike the dockside casino structure in *Pavone*, they are not permanently connected to any land-based structures.

The vessel in *Stewart* actually resembled the Gowanus barges in many respects. It was a dredge with "only limited means of self-propulsion" that required a tugboat to move any "appreciable distance" (543 U.S. at 484). In determining whether the dredge was a "vessel," this Court found that it was the watercraft's *potential*, rather than its *actual* use, that determined its status: "section 3 [1 U.S.C. § 3] requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose" (*id.* at 495). This Court further stated, "[u]nder § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" (*id.* at 497). This Court did not, as Petitioner suggests, hold that an owner's intent be considered (Pet. 18). The Court clearly defined "vessel" and this case offers no reason to revisit that definition.

Petitioner ignores the applicable definition of a "vessel" as articulated in *Stewart*, which focuses on the

barge's *potential* use as a means of transportation on water. The focus, despite Petitioner's claims to the contrary, is *not upon the particular function for which* a vessel is used at a given time, but rather its potential use as a means of transportation on water. Without question, the Gowanus barges are "capable of being used as a means of transportation on water" (*Stewart*, 543 *U.S.* at 495). They have been so used in the past, and would likely be used to transport their generators to different locations again, should the need arise.

The determination that the barges are vessels is consistent with numerous post-*Stewart* cases involving other types of non-traditional watercraft (*see Board of Commissioners of the Orleans Levee District v. M.V. Belle of Orleans*, 535 F.3d 1299 [11th Cir. 2008] [applying *Stewart* definition of vessel to find that a riverboat casino is a vessel]; *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 [7th Cir. 2006] [injury caused by a defective stool in a riverboat casino that had not been "permanently moored," so as to be the "equivalent of landfill," was an injury caused by a vessel]; *Holmes v. Atl. Sounding Co.*, 437 F.3d 441, 448 [5th Cir. 2006] [applying *Stewart* criteria to hold that a barge used as a floating dormitory to house the crew of a dredge was a vessel]; *Bunch v. Canton Marine Towing Co.*, 419 F.3d 868 [8th Cir. 2005] [analyzing *Stewart* to hold that a cleaning barge attached to a riverbed by poles was a vessel]; *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138 [2d Cir. 2005] [bucket dredge was properly classified as a vessel]; *Calcaterra v. City of N.Y.*, 45 A.D.3d 270 [N.Y. App. Div. 2007] [barge used in connection with construction of sewer main held to be a vessel under *Stewart* for purposes of the Jones Act]).

The cases relied upon by Petitioner are clearly distinguishable and thus, have no bearing upon whether certiorari should be granted in this unusual factual situation. The structures at issue in *Howard v. S. Ill. Riverboat Casino Cruises, Inc.* (364 F. 3d 854 [7th Cir. 2004], *cert. denied*, 543 U.S. 942 [2004]), *De La Rosa v. St. Charles Gaming Co., Inc.* (474 F.3d 185 [5th Cir. 2006]), and *Belle of Orleans, supra,* (535 F.3d 1299 [11th Cir. 2008]) were riverboat casinos which were indefinitely moored. None of these cases involved the issue of whether a particular structure was a vessel for purposes of the LHWCA; rather, the issue in *Howard*, as well as in the earlier Fifth Circuit case, *Pavone*, was whether casino employees on indefinitely moored riverboat casinos were "seamen" on "vessels in navigation" for purposes of the Jones Act. Notably, the position taken by Petitioner is actually *adverse* to that of the plaintiffs in such cases as *Pavone* and *Howard*, who would be afforded greater protection under the Jones Act than under the laws of their respective states.

Other cases relied on by Petitioner were decided prior to *Stewart* and likewise involved dissimilar types of structures. Both *Roper v. United States* (368 U.S. 20 [1961]), and *West v. United States* (361 U.S. 118 [1959]), concerned attempts to hold the United States government liable for injuries to persons working for private contractors aboard mothballed "Liberty" ships that had been decommissioned. They relied on the law as it existed prior to the 1972 amendments to the LHWCA and therefore have little precedential value today.

The structure at issue in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.* (271 U.S. 19 [1926]), was a wharf boat that was being used as an extension of a pier. It was essentially a building with an office and quarters for the men in charge; was connected to the land by a driveway; and was lined with concrete eight inches thick. Similarly, the dry-dock at issue in *Cope v. Vallette Dry-Dock Co.* (119 U.S. 625 [1887]) was a structure "contrived for the purpose of taking ships out of the water, in order to repair them, and for no other purpose" (119 U.S. at 627). Finally, in *Kathriner v. UNISEA, Inc.* (975 F.2d 657 [9th Cir. 1992]), the floating fish-processing plant at issue, unlike Gowanus Bay No. 1, did not retain any functional transportation capacity. Rather, like the wharfboat in *Evansville*, it was "designed as a floating factory – merely extending land over water for the purpose of increasing the usable space of a dock-side fish-processing operation," and was not even watertight (*id.* at 660-661). As such, these cases provide no support for granting the Petition.

In sum, given the straightforward, fact-specific application of the *Stewart* criteria by the New York Court of Appeals in determining that Gowanus Bay No. 1 is a "vessel," the state court's holding presents no compelling reason for granting certiorari. Moreover, even if this Court were to conclude that the application of the *Stewart* definition by the Court of Appeals was incorrect, the court's holding would still not provide a compelling reason for granting certiorari, since at most it would represent the misapplication of a properly stated rule of law (*see* Sup. Ct. R. 10). Therefore, the Petition should be denied.

II. CERTIORARI SHOULD NOT BE GRANTED HERE TO RESOLVE A PURPORTED CONFLICT IN THE CIRCUITS AS TO THE VESSEL STATUS OF RIVERBOAT CASINOS

Petitioner attempts to fashion a conflict among the Circuit Courts of Appeals by arguing that a Fifth Circuit case, *De La Rosa v. St. Charles Gaming Co., Inc.* (474 F.3d 185 [5th Cir. 2006]), and a Seventh Circuit case, *Howard v. S. Ill. Riverboat Casino Cruises, Inc.* (364 F.3d 854 [7th Cir. 2004], *cert. denied*, 543 U.S. 942 [2004]), are inconsistent with an Eleventh Circuit case, *Board of Commissioners of Orleans Levee District v. M.V. Belle of Orleans* (535 F.3d 1299 [11th Cir. 2008]). In *De La Rosa*, the Fifth Circuit, after reviewing *Stewart*, held that an indefinitely moored riverboat casino was not a vessel for purposes of admiralty jurisdiction, concluding that the casino's potential use as a means of transportation over water was merely theoretical and not a practical possibility. In *Howard*, similarly, the Seventh Circuit held that employees of a riverboat casino were not seamen on a vessel in navigation for purposes of the Jones Act.

However, in *Belle of Orleans*, the Eleventh Circuit, also relying upon *Stewart*, held that an indefinitely moored, but fully operational, riverboat casino was a "vessel" for purposes of establishing admiralty jurisdiction, even though the owners of the casino had informed the Coast Guard that they intended to operate it in a continuously moored status. The Eleventh Circuit concluded that the owners' apparent intent was not

dispositive of vessel status, since state laws[4] and owners' intentions can change, and jurisdictional rules intended to be uniform should not be subject to such uncertainties (*Belle of Orleans, supra*, 535 F3d at 1311-1312).

Initially, all these cases are distinguishable from the instant case for the simple reason that they involve riverboat casinos, not floating power generating stations. Unlike the Gowanus barges, which serve a maritime purpose in the sense that they can be used to provide electrical power to different shoreside locations as needed, an indefinitely moored riverboat casino serves no maritime purpose. The Fifth Circuit in *De La Rosa* specifically stated that the casino's operations were entirely gaming-related, not maritime in nature (*De La Rosa, supra*, 474 F3d at 187).

To the extent that there is any conflict among the Fifth, Seventh and Eleventh Circuits as to the vessel status of indefinitely or ostensibly permanently moored riverboat casinos, this is not the issue presented here. Petitioner has not, and cannot, point to a conflict between the New York Court of Appeals and any other court, either federal or state, as to whether a floating electrical power generating station is a vessel for purposes of the LHWCA. Moreover, the apparent conflict among the Circuits as to the vessel status of

---

4. The Eleventh Circuit noted that initially, Louisiana law required that riverboat casinos, including the Belle of Orleans, be cruising navigable waters when engaged in gaming operations. In 2001, the Louisiana Legislature abolished the cruising requirement and stated that gaming could only occur when a riverboat was dockside (*Belle of Orleans, supra*, 535 F3d at 1303-1304).

riverboat casinos may simply represent a reluctance to extend admiralty jurisdiction to patrons and employees of such gaming-related establishments.

Furthermore, the apparent conflict between *Belle of Orleans* and cases involving issues of a "vessel in navigation" or "seaman" status for purposes of the Jones Act may be illusory. The determination in any such case is necessarily fact specific, depending on the characteristics of the "vessel" and the plaintiff's employment, i.e., whether the plaintiff's connection to a vessel was substantial both in nature and duration, as suggested in *Stewart* (543 U.S. at 494-495).

Finally, the instant case does not present one of the critical factual issues in the riverboat casino cases, since it does not establish whether Astoria/Orion ever stated an intention to "permanently moor" the Gowanus barges, as did the owners of the *Belle of Orleans*. Accordingly, any perceived conflict among the Circuits as to the status of indefinitely moored riverboat casinos is irrelevant and is not a basis for granting certiorari here.

III. SINCE THE PETITIONER'S CLAIM IS CLEARLY SUBJECT TO MARITIME JURISDICTION, THE NEW YORK COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER'S STRICT AND VICARIOUS LIABILITY CLAIMS AGAINST ASTORIA/ ORION WERE PREEMPTED

The Claim Satisfies The "Situs" And "Status" Tests For Maritime Jurisdiction

The majority at the Court of Appeals, and the dissenting justice at the Appellate Division, did not reach the issue of whether Petitioner's claims satisfied the "status" test for admiralty jurisdiction, since there was no question that his claim was covered by the LHWCA, and his claim against Astoria/Orion, as the owner of the vessel where he was allegedly injured, was covered by 33 U.S.C. § 905(b).

Even assuming for purposes of argument that, pursuant to *McLaurin v. Noble Drilling (US) Inc.* (529 F.3d 285 [5th Cir. 2008]), the Court of Appeals should first have determined whether Petitioner's claim against the vessel met the "situs" and "status" tests for maritime tort jurisdiction before deciding whether his claim was covered by § 905(b), any omission in this regard is inconsequential, and does not provide a compelling reason for granting certiorari. First, Petitioner's claim satisfies the "situs" test since he was concededly on navigable waters when he was allegedly injured. The claim also satisfies the "status" test, since Petitioner was overhauling a gas turbine on a vessel, and ship repair is

quintessentially a maritime activity. Not only is it one of the activities defining the term "harbor worker" for purposes of the LHWCA (*see* 33 U.S.C. §§ 902(3), 905[b]), but numerous courts have held that repairing or installing machinery on ships represents traditional maritime activity for jurisdictional purposes (*see e.g.*, *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064 [11th Cir. 1996] [worker installing an elevator on a ship was engaged in maritime activity even though he alleged that he was merely a "construction worker"]).

In this regard, there is no merit to Petitioner's contention that the barge and the generating equipment it contains should be viewed as separate "structures," any more than specialized machinery aboard different types of watercraft should be viewed as a separate structure. The term "vessel" has been interpreted to include the vessel's fixtures, furniture and other "appurtenances" (*see Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 [1995]; *Scott v. Trump Indiana, Inc.*, 337 F.3d 939, 943 [7th Cir. 2003]; *Anderson v. United States*, 317 F.3d 1235, 1237-1238 [11th Cir. 2003]).

Furthermore, in seeking benefits under the LHWCA, Petitioner argued that his work was not "land-based." He also established that his presence aboard the Gowanus barges was neither "transient" nor "fortuitous." At least one court has indicated that this, in itself, may be sufficient to satisfy the "status" test (*see Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251, 254 [5th Cir. 2007] [the presence of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous]).

Finally, as the Court of Appeals properly determined, this case is distinguishable from *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *rearg. denied*, 96 N.Y.2d 793 [2001]), upon which Petitioner relies, inasmuch as *Cammon* involved a claim against a *landowner*, rather than a vessel owner, and did not involve a § 905(b) claim.

The Court Of Appeals Properly Determined That Petitioner's Strict And Vicarious Liability Claims Against Astoria/Orion Were Preempted

In determining that Petitioner's state court claims were preempted, the New York Court of Appeals noted that "the LHWCA clearly states in section 905(b) that an action in negligence may be brought against a vessel and that such remedy 'shall be exclusive of all other remedies against the vessel except remedies available under this chapter'" (Pet. App. 9a, *quoting* 33 U.S.C. § 905[b]). The Court of Appeals also reviewed the congressional intent to find that "actions maintained against a vessel [must] be brought solely within the confines of the LHWCA and nowhere in the Act does it permit strict liability claims, as provided in [New York's Labor Law sections]" (Pet. App. 9a).

Additionally, the Court of Appeals appropriately applied the relevant state and federal case law in concluding that Petitioner's state law claims were explicitly limited by Congress in the LHWCA and were, therefore, preempted (*see e.g., Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297 [1983] [reviewing and analyzing LHWCA and its breadth]; *Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46 (N.Y. App. Div.

2004) [plaintiff precluded from suing employer and limited to negligence claim under § 905 because he was covered under the LHWCA]; *Sutherland v. City of N.Y.*, 266 A.D.2d 373 [N.Y. App. Div. 1999] [§ 240(1) claim preempted by the LHWCA]; *Rigopoulos v. State of N.Y.*, 236 A.D.2d 459 [N.Y. App. Div. 1997] [claims under Labor Law §§ 240(1) and 241(6) preempted by the LHWCA]; *Tibak v. City of New York*, 154 A.D.2d 313 [N.Y. App. Div. 1989], *lv. denied*, 75 N.Y.2d 705 [accident on a pier rehabilitation project where worker was killed when a crane on a barge hit him was governed by general maritime law and the LHWCA]; *Tompkins v. Port of New York Authority*, 217 A.D.2d 269 [N.Y. App. Div. 1996] [substantive federal law rather than state Labor Law applied]).

The exclusivity provisions, and the preemptive sweep of the LHWCA, were clarified by the 1972 amendments to the LHWCA. As this Court explained in *Scindia Steam Nav. Co. v. De Los Santos* (451 U.S. 156 [1981]), one purpose of the 1972 amendments was

> [T]o make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected

(451 U.S. at 168). The 1972 amendments unequivocally state that one of Congress's purposes was to abolish the imposition of strict liability on vessel owners.

Moreover, in *Norfolk Shipbuilding & Drydock Corp. v. Garris* (532 U.S. 811, 818 [2001]), this Court explicitly held that the LHWCA expressly preempts all other claims against vessels and employers. Thus, the Court of Appeals appropriately held that as an employee covered under the LHWCA, Petitioner's claims against Astoria/Orion as the vessel owner were limited to those remedies provided in § 905(b) of the LHWCA.

Petitioner's attempt to avoid preemption by arguing that New York's Labor Law § 240(1) is an action for negligence as that term is used in 33 U.S.C. § 905(b) is without merit. Labor Law § 240(1) imposes absolute and vicarious liability on faultless defendants for the acts of independent contractors, and thus creates something other than a negligence remedy. There can be no doubt of the conflict between the two statutes, thereby warranting preemption. Petitioner's Labor Law § 240(1) claim was properly dismissed as it conflicted with § 905(b) of the LHWCA.

Finally, by holding that 33 U.S.C. § 905(b) expressly preempted Petitioner's state law claims against Astoria/Orion, the Court of Appeals did not have to reach the broader issue of whether the general maritime law impliedly preempts claims under Labor Law §§ 240(1) and 241(6). Accordingly, the instant case does not provide an appropriate setting in which to review that issue, and certiorari should not be granted on that basis.

In the event, however, that this Court decides to grant the Petition, defendants join in the request of Third-Party Defendants-Respondents Elliott Turbomachinery Co., Inc. and Elliott Company that the

Court direct the parties to brief the issue of whether *Cammon v. City of New York* (95 N.Y.2d 583 [2000]) was properly decided.

IV. PETITIONER'S NEGLIGENCE CLAIM WAS DISMISSED ON STATE LAW GROUNDS, AND THE RECORD PROVIDES NO BASIS FOR FINDING A BREACH OF THE "*SCINDIA*" DUTIES

In dismissing Petitioner's Labor Law § 200 (common-law negligence) claim, the motion court held that the record clearly demonstrated that Astoria/Orion did not exercise any supervision or control of the methods or materials of Petitioner's work, and that he only received instruction from his employer Elliott's personnel. The dismissal of the negligence claim was affirmed by the Appellate Division, and tacitly approved by the Court of Appeals, which reinstated the motion court's decision.

Petitioner's attempt to rely on Labor Law §§ 240(1) and 241(6) to state a cause of action in negligence under *Scindia Steam Nav. Co. v. De Los Santos* (451 U.S. 156, 172 [1981]) for violation of § 905(b)'s "active operations" duty and "duty to intervene" is an attempt to do indirectly that which he cannot do directly: assert strict and vicarious liability claims in the guise of a negligence claim against a vessel owner under the LHWCA. Accordingly, Petitioner's arguments in this regard must be rejected. Nor does the Record otherwise establish a basis for finding a breach of the so-called *Scindia* duties: (1) the turnover duty, (2) the active control duty, and

(3) the duty to intervene (*see Emanuel v. Sheridan Transp. Corp.*, 10 A.D.3d 46, 52 [N.Y. App. Div. 2004]; *see also Scindia*, 451 U.S. at 172).

As Petitioner has conceded, the "turnover" duty has no bearing on this case. Nor is there any basis for finding a breach of the "active operations" duty or the "duty to intervene." Petitioner was injured while working on a turbine and was not at risk from hazards in other areas under the barge's control. Inasmuch as it is undisputed that Astoria/Orion exercised no active control over Petitioner's work, which was supervised by his employer Elliott, Petitioner cannot claim that Astoria/Orion breached the "active operations duty."

Similarly, Astoria/Orion did not breach a duty to intervene. The duty to intervene arises when a shipowner is aware that "a condition of the vessel or its equipment poses an unreasonable risk of harm and the stevedore is not exercising reasonable care to protect its employees from that risk" (*Emanuel*, 10 A.D.3d at 52). Petitioner offered no proof that conditions on Gowanus Bay No. 1 created an "unreasonable risk of harm," or that Astoria/Orion was aware of any dangerous conditions. Thus, there was no breach of any duties under *Scindia* as a matter of law.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

BARBARA D. GOLDBERG
MAURO GOLDBERG & LILLING LLP
60 Cutter Mill Road, Suite 200
Great Neck, New York 11021
(516) 487-5800
BDGoldberg@mglappeals.com

Counsel for Respondents
Astoria Generating Company, L.P.,
Orion Power New York GP, Inc.,
Orion Power New York, L.P., and
Orion Power New York LP, LLC

168

No. 09-1567

AUG 10 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES D. LEE,

Petitioner,

— v. —

ASTORIA GENERATING COMPANY, L.P., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF

PAUL THOMAS HOFMANN
HOFMANN & SCHWEITZER
360 West 31st Street
New York, New York 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner

COUNSEL PRESS
(800) 274-3321 (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

POINT I — CONFLICT EXISTS AMONG THE CIRCUITS ON WHAT IS THE PROPER TEST FOR VESSEL STATUS 1

POINT II — THE COURT OF APPEALS ERRED IN FINDING MARITIME JURISDICTION OVER PETITIONER'S TORT CLAIM AGAINST THE LAND-BASED POWER PLANT OWNER 3

POINT III — RESPONDENTS IGNORE THE SUPREME COURT'S DIRECTIVES ON HOW TO DETERMINE VESSEL STATUS 9

POINT IV — THE *CAMMON* CASE IS GOOD LAW AS THE MARITIME BUT LOCAL DOCTRINE PROHIBITS FEDERAL MARITIME LAW PREEMPTION OF SAFETY REGULATIONS PROTECTING NEW YORK CONSTRUCTION WORKERS 11

POINT V THE NEW YORK COURTS WRONGLY REFUSED TO APPLY *SCINDIA* TO THE PETITIONER'S CLAIMS 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases: *Page(s)*

Anaya v. Traylor Brothers, Inc.,
478 F.3d 251 (5th Cir. 2007) 3, 4

Belle of Orleans,
535 F.3d 1299 (11th Cir. 2008) 1, 2

Cammon v. City of New York,
95 N.Y.2d 583 (2000), *reary. denied*,
96 N.Y.2d 793 (2001) 10, 11, 12

Cooley v. Board of Port Wardens,
53 U.S. (12 How.) 299 (1852) 13

Cope v. Vallette Dry-Dock Co.,
119 U.S. 625 (1887) 10

De La Rosa v. St. Charles Gaming Co.,
474 F.3d 185 (5th Cir. 2006) 1, 2

Director, OWCP v. Perini North River Associates,
459 U.S. 297 (1983) 3

Evansville & Bowling Green Packet Co. v.
Chero Cola Bottling Co.,
271 U.S. 19 (1926) 1, 9-10

Foster v. Peddicord,
826 F.2d 1370 (4th Cir. 1987), *cert. denied*,
484 U.S. 1027 (1988) 7

Grant Smith-Porter Ship Co. v. Rohde,
257 U.S. 469 (1922) 11, 12

H20 Houseboat Vacations, Inc. v. Hernandez,
103 F.3d 914 (9th Cir. 1996) 7

Howard v. S. Ill. Riverboat Casino Cruises, Inc.,
364 F.3d 854 (7th Cir. 2004) 1

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 13

In Re: Katrina Canal Breaches Litigation,
324 Fed. Appx. 370, 2009 U.S. App. Lexis 9342
(5th Cir. 2009) 8

*Jerome B. Grubart, Inc. v.
Great Lakes Dredge & Dock Co.*,
513 U.S. 527 (1995) ..... *passim*

Kathriner v. Unisea, Inc.,
975 F.2d 657 (9th Cir. 1992) 10

Kernan v. American Dredging Co.,
355 U.S. 426 (1958) 11

Pavone v. Mississippi Riverboat Amusement Corp.,
52 F.3d 560 (5th Cir 1995) 1, 2, 10

Robins Dry Dock and Repair Co. v. Dahl,
266 U.S. 449 (1925) 12

Roper v. United States,
368 U.S. 20 (1961) 10

Scindia Steam Navigation Co. v. De Los Santos,
451 U.S. 156 (1981) 12, 13

Sisson v. Ruby,
497 U.S. 358 (1990) 7, 9

Stewart v. Dutra Construction,
543 U.S. 481 (2005) 1, 2, 9

Texaco Exploration & Prod. v.
Amclyde Engineered Prods.,
448 F.3d 760 (5th Cir. 2006) 8

Victory Carriers v. Law,
404 U.S. 202 (1972) 5

Watson v. Indiana Gaming Co., Inc.,
337 F. Supp. 2d 951 (E.D. Ky. 2004) 5, 6

West v. United States,
361 U.S. 118 (1959) 10

Yamaha Motor Corporation v. Calhoun,
516 U.S. 199 (1996) 12

Statutes:

1 U.S.C. § 3 1

33 U.S.C. § 901 4

33 U.S.C. § 905(b) 3, 11

Labor Law § 240 12

Preliminarily, respondents concede that the structure involved here has not moved for 41 years, except for painting of its steel bottom in a dry dock about once a decade. Since painting cannot be done under water, the hull has to be floated to and placed in a dry dock. That movement does not constitute navigation in any true sense. *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926) (structure not vessel in navigation regardless of fact each winter boat was towed to a protected harbor). This strongly suggests the structure here is not a vessel in navigation.

POINT I CONFLICT EXISTS AMONG THE CIRCUITS ON WHAT IS THE PROPER TEST FOR VESSEL STATUS

Respondents recognize that there is a conflict among the various Circuits on the issue of what constitutes a vessel when that structure is essentially permanently moored and is servicing a land-based commercial enterprise. *Cf. Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008), *Pavone v Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir 1995), *De La Rosa v St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir 2006) and *Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004).

Respondents suggest the conflict is irrelevant because casino boats should be considered *sui generis* from other floating structures. However, 1 U.S.C. § 3 makes no distinction for casino boats, so their status, like all other structures, is ruled by the Supreme Court's *Stewart* decision, and others, which need

clarification for determining which structures shall be considered to be vessels in navigation or simply land-based structures. Resolving that conflict by a grant of certiorari is important because the energy barge in issue, using the general contours of the *De La Rosa* and *Pavone* analysis, would fail the test for a vessel in navigation, while applying the *Belle of Orleans* analysis might lead to a different result. Since the casino boat cases informed the reasoning of *Stewart v. Dutra Construction*, 543 U.S. 481 (2005) (referencing *Pavone*) and the Appellate Division decision (citing *Pavone* and *De La Rosa)* resolution of the conflict in the casino boat cases is relevant.

The Maritime Law Association ("MLA") also is of the opinion, as stated in its motion seeking to submit an *amicus* brief, that a significant conflict exists among the Circuits.[1]

---

[1] MLA defines the primary question to be whether an owner's intention for the structure's use should be considered as a factor in determining vessel status. Petitioner asserts that this is insufficient, and contends that the extent of use of the vessel as a means of maritime transportation in the past, as well as proposed, are also relevant.

POINT II THE COURT OF APPEALS ERRED IN FINDING MARITIME JURISDICTION OVER PETITIONER'S TORT CLAIM AGAINST THE LAND-BASED POWER PLANT OWNER

The Court of Appeals made reversible error on a significant issue of federal maritime law in finding that petitioner's claim against the power plant owner was covered by maritime law, not state law. If the Court here agrees that maritime jurisdiction was absent, then state law applies to the claims, which would moot the issue because § 905(b) would not be involved.[2]

Anaya v. Traylor Brothers, Inc., 478 F.3d 251 (5th Cir. 2007), cited by respondents, exemplifies the distinction. That case did not involve a determination of whether there was general maritime jurisdiction

---

[2] Respondents confuse the statutory grant of jurisdiction in LHWCA with the general maritime law jurisdiction where they assert that petitioner takes an inconsistent position here by arguing that no maritime jurisdiction applies to his tort claim, even though he obtained LHWCA benefits. The jurisdictional requirements of each are different. Before the ALJ, in seeking LHWCA benefits, claimant contended that "[t]he sole issue here is whether Barge #1 *was on navigable waters* at the time of the accident", a showing which would bring his compensation claim under the purview of LHWCA, *Director, OWCP v. Perini.North River Associates*, 459 U.S. 297 (1983). Petitioner never contended that the claim met other requirements to support general maritime law jurisdiction.

under *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) but whether there was Longshore and Harbor Compensation Act, 33 U.S.C. § 901 et seq. ("LHWCA") or state workers compensation jurisdiction over an injured employee's workers compensation claim. *Anaya*, at 478 F.3d 254, explains:

> To receive benefits under the LHWCA, a worker must satisfy both *a situs* and status test. The situs test concerns geographic areas *covered by the LWHCA*, whereas the status test concerns an employee's type of work activities. The situs test includes injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." The status test defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." (citations omitted).

Under the general maritime law, although the situs test is similar, that the injury occur on the navigable waters, the status test is much different. As *Grubart* explains, the status test under the general

maritime law requires that the tort have a connection to a maritime activity, 513 U.S. at 534, failing that, state law applies. *Victory Carriers v. Law*, 404 U.S. 202 (1972).

Watson v. Indiana Gaming Co., Inc., 337 F. Supp. 2d 951 (E.D. Ky. 2004) explains:

> The Supreme Court has held that a party seeking to invoke federal admiralty jurisdiction over a tort claim must satisfy conditions both of location and of connection with maritime activity. The "locality" prong requires that the alleged tort must have occurred on navigable water... As to the second "connection" factor, the Court has established a two-part inquiry. First, the court must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Next, the court must examine the general conduct from which the incident arose to determine whether there is a "substantial relationship" between the activity giving rise to the incident and traditional maritime activity. "If the tort produces no potential threat to maritime commerce or occurs during activity lacking a substantial relationship to traditional maritime activity, *Sisson* assumes that the objectives of admiralty jurisdiction probably do not require its

> exercise, even if the location test is satisfied." *(citations omitted).*

337 F. Supp. 2d 455.

A. Maritime Jurisdiction is Absent Because No Vessel In Navigation Involved, Nor Was a Traditional Maritime Activity Involved

Respondents misleadingly describe the general characteristics of the work Mr. Lee performed as vessel repair, by analogizing it to installing a ship's generator or elevator. It was not. Mr. Lee was overhauling power plant generators, that for convenience sake were situated on floating platforms, he was not repairing vessel equipment. The turbines did not produce power for the barge. As respondents conceded below, "[p]laintiff's work did not affect the structural integrity of the barge, and his work on the turbine did not affect 'an integral part of the barge's structure'". (Respondents' Statement to the Court of Appeals).

As the Appellate Division noted:

> Moreover, the turbine facility, whose sole purpose is to provide electrical power to these neighborhoods, is permanently moored, serves no ancillary maritime purpose, and was not intended to operate as a vessel in navigation. The facility receives its utilities from shore, and as noted, provides power via lines that run from the barge to the Con Ed substation. The facility is not self-propelled, and was designed and

> intended to be a power plant, not a means of water transportation or maritime commerce.

Appendix B, 31a.

Mr. Lee's claim lacks maritime jurisdiction because it fails to fulfill the status requirement under the *Grubart/Sisson* test for maritime jurisdiction. First, it fails the 'potentially disruptive impact' threat posed to maritime commerce factor. That threat must be more than mere speculation, and must be tied in some part to the incident leading to the injury. *H20 Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 917 (9th Cir. 1996). In the present case, no disruption to maritime commerce reasonably could be expected from a fall inside the exhaust well of the turbine, which is fully contained in the factory structure above the platform. A worker injured in such manner would walk or be carried off of the platform via the boarding ramp leading to the pier, which has happened, or could have happened, for the past 41 years.

Petitioner's tort claim also fails the second prong of the "status" requirement because what he was doing at the time did not constitute a traditional maritime activity. *Foster v. Peddicord*, 826 F.2d 1370 (4th Cir. 1987), *cert denied*, 484 U.S. 1027 (1988) (recreational swimming not a traditional maritime activity).

The Supreme Court states that the maritime activity test is fulfilled when "a tortfeasor's activity, commercial or noncommercial, on navigable waters is

so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case at hand." *Grubart*, 513 U.S. at 539-40.

Instructive is *Texaco Exploration & Prod. v. Amclyde Engineered Prods.*, 448 F.3d 760 (5th Cir. 2006) where the court analyzed whether claims arising from a construction accident were covered by maritime law, when a component of a crane situated on a barge failed, causing a load to fall and damage a platform structure under construction in the Gulf of Mexico on what is considered in law "on land" because it was covered by the Outer Continental Shelf Lands Act, ("OCSLA"). The activities surrounding the development at the platform were covered by OCSLA, and looking at the general contours of the work in progress, the court held it was not covered by maritime law.

Similarly, in *In Re: Katrina Canal Breaches Litigation*, 2009 U.S. App. Lexis 9342 (5th Cir. 2009), maritime jurisdiction was found lacking over claims that a dredging company, through the use of a barge mounted crane, had negligently cleared a canal which failed during Hurricane Katrina. The court found that "the improvement project implicated only local, land-based interests, and the connection, if any, to admiralty law is "wholly fortuitous"... To the extent that Defendants' dredging implicates connection to maritime law, that connection is overshadowed greatly by the canal project's connection to the local interest of drainage and flood-prevention." *Id.* at *26.

In sum, Elliot's renovation of Orion's turbines did not constitute an activity bearing a substantial relationship to a traditional maritime activity. It simply was a construction project, renovating turbines, performed for the benefit of a land-based enterprise, the electric grid network distribution plant which supplied electric power to Queens and Brooklyn. There was nothing 'maritime' about the operation of that facility, or the work plaintiff performed. The turbines were removed from the Brooklyn site and sent to a factory in Pennsylvania for refurbishing. The turbine for the energy plant was being overhauled, not the floating platform upon which it fortuitously was located. Accordingly, both elements of the "maritime activity" prong of the *Grubart/Sisson* test are lacking here, in addition to the failure to fulfill the maritime location/situs requirement (because the structure did not constitute a vessel in navigation), accordingly, there is no maritime jurisdiction over this claim.

POINT III RESPONDENTS IGNORE THE SUPREME COURT'S DIRECTIVES ON HOW TO DETERMINE VESSEL STATUS

The Supreme Court's decision in *Stewart* explained how to apply the practically capable of being used as a means of transportation test through the incorporated precedents to which it cited, and the principles for which those cases stand. There are similar characteristics between the structures in those cases and the power plant involved here, which similarities respondents ignore. *See, Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*,

271 U.S. 19 (1926) (floating wharfboat secured by cables to the shore and connected to onshore utilities "was not practically capable of being used as a means of transportation"); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995)(floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887) (floating drydock, which during normal use would be sunk then raised up under a craft to lift it out of the water to be repaired, was a "fixed structure" that had been "permanently moored" to the mainland by chains and spars, rather than being a vessel that had been temporarily anchored), *Kathriner v. Unisea, Inc.*, 975 F.2d 657 (9th Cir. 1992) (former ship turned into floating fish processing plant not practicably capable of transportation over the water and thus no longer a vessel in navigation); *West v. United States*, 361 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961) (mothballed Liberty ships not vessels in navigation where one was in midst of being transported to repair yard to be reactivated and the other was being used as a floating grain storage elevator). Respondents simply cannot distinguish those cases from the present one.

POINT IV THE *CAMMON* CASE IS GOOD LAW AS THE MARITIME BUT LOCAL DOCTRINE PROHIBITS FEDERAL MARITIME LAW PREEMPTION OF SAFETY REGULATIONS PROTECTING NEW YORK CONSTRUCTION WORKERS

Elliot asks this court to consider reviewing a prior case of the New York Court of Appeals, *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), *rearg. denied*, 96 N.Y.2d 793 (2001). Obviously respondent in this matter has no right to such a review, and has not cross-appealed so that request must be denied. However, of note, the Astoria/Orion defendants concede the New York Court of Appeals "properly determined this case is distinguishable from *Cammon v. City of New York* (95 N.Y.2d 583 [2000], *rearg. denied*, 96 N.Y.2d 793 [2001])... inasmuch as Cammon involved a claim against a landowner rather than a vessel owner, and did not involve a § 905(b) claim." For those reasons alone the request for the court to consider analyzing the *Cammon* case should be outright denied.[3]

---

[3] New York's Labor Law claims are not equivalent to general maritime law unseaworthiness claims. They do place upon contractors and property owners non-delegable duties, the violation of which creates a cause of action for statutory violations analogous to that permitted by maritime law. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Although Congress did away with the cause of action for unseaworthiness for those asserting vessel negligence claims, it did not prohibit claims for negligence

Mr. Lee asserts entitlement to benefit from New York's construction protection laws, because he was a construction worker working upon a land-based commercial enterprise. Respondents mis-rely on *Robins Dry Dock and Repair Co. v. Dahl*, 266 U.S. 449 (1925), which held that an injured worker doing repairs on a ship in navigation could not rely on a predecessor to New York Labor Law § 240 in issue here. As stated, the current case does not involve a vessel in navigation, and as such, injury claims on structures not constituting vessels in navigation are covered by state law. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922).

Equally important the law has evolved from the time of *Rohde* that state substantive law often will apply to a claim arising out of an injury occurring on the navigable waters where state interests outweigh putative federal concerns. *See, Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996) and *Jerome E. Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995), both of which informed the decision in *Cammon v. City of New York*, 95 N.Y.2d 583 (2000), which held that in maritime construction injury matters, New York's Labor Law was not preempted by federal maritime law, when the claim was against a landowner, recognizing that the "maritime but local" doctrine permits significant state regulation where matters of health and safety, traditional state areas of concern, are involved. This deferral is longstanding and significant. *See, e.g.*

---

based on other sources of non-delegable duties or negligence per se for violations of safety laws.

Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299 (1852), *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

POINT V THE NEW YORK COURTS WRONGLY REFUSED TO APPLY *SCINDIA* TO THE PETITIONER'S CLAIMS

When petitioner appealed the motion court's decision not to apply *Scindia*[4] to his negligence claim, the Appellate Division affirmed, as did the Court of Appeals. Neither court reviewed petitioner's claims in light of *Scindia's* rules. As a matter of maritime law, if the court finds LHWCA preempts the state law claims, this court should order the negligence claims be remanded for consideration as to the applicability of petitioner's *Scindia* based arguments.

As *Scindia* recognized, custom, practice and statutes could provide the duties to a maritime entity to intervene or act, but the New York courts ignored this court's ruling on the issue. Petitioner claims that he can rely on New York's Labor Laws to provide both the custom and statutory duty that was breached by the barge's owner. Thus, that portion of the decision should be remanded, if the court finds that a vessel in navigation was involved here.

---

[4] *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

CONCLUSION

For the reasons stated within the petition and in this reply brief, the Supreme Court should grant certiorari in this matter, and ultimately reverse the judgment of the New York Court of Appeals.

Respectfully submitted,

PAUL THOMAS HOFMANN
HOFMANN & SCHWEITZER
360 West 31st Street
New York, New York 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUL 26 2010
CLERK

No. 09-1567

IN THE

Supreme Court of the United States

James D. Lee,
Petitioner,

v.

Astoria Generating Company, L.P., et al.
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Patrick J. Bonner
Freehill Hogan & Mahar
80 Pine Street
New York, NY 10005
(212) 425-1900
President
Maritime Law Assoc.

Charles G. De Leo*
Fowler White Burnett
1395 Brickell Avenue
Miami, FL 33131
(305) 789-9200
cgd@fowler-white.com
Counsel for Amicus

*Counsel of Record

July 26, 2010

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

No. 09-1567

IN THE

Supreme Court of the United States

James D. Lee,

Petitioner,

v.

Astoria Generating Company, L.P., et al.

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF WITHOUT THE CONSENT OF ALL THE PARTIES

Now comes the Maritime Law Association of the United States ("MLA") and pursuant to Supreme Court Rule 37.2(b) moves this Court for leave to file a brief as *amicus curiae* without the consent of all of the parties.

The MLA is a voluntary, nationwide bar association founded in 1899, with a membership of approximately 3,000 attorneys, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests – ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The Petitioner's legal representative has consented to the MLA filing an *amicus curiae* brief; however, none of the other parties have given their consent to the MLA to file an *amicus curiae* brief. Specifically, Respondents Astoria Generating Company, Orion Power New York GP, Inc., Orion Power New York, LP, Orion Power New York LP, LLC, Elliot Turbomachinery Co., Elliot Company, have not given consent to the MLA to file an *amicus curiae* brief. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA wishes to submit the enclosed *amicus curiae* brief only to argue in favor of review. The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve

what is a conflict amongst the Circuit Courts of Appeals and various state courts.

No delay in the proceedings will result in the granting of this application and the MLA believes that the proposed *amicus curiae* brief will be of considerable help to the Court. Pursuant to Supreme Court Rule 37.2(b) the proposed *amicus curiae* brief is attached to this motion.

Respectfully submitted,

Patrick J. Bonner
Freehill Hogan & Mahar
80 Pine Street
New York, NY 10005
(212) 425-1900
President
Maritime Law Assoc.

Charles G. De Leo
Counsel of Record
Fowler White Burnett
1395 Brickell Avenue
Miami, FL 33131
(305) 789-9200
cgd@fowler-white.com

Counsel for Amicus

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE CONFLICT OVER THE APPLICATION OF THE VESSEL STATUS TEST IN *STEWART V. DUTRA* CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ENTITIES AND THOSE WHO ADVISE THEM	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page(s)

Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans, 535 F.3d 1299 (11th Cir. 2008).....7, 8

De LaRosa v. St. Charles Gaming Co., Inc., 474 F. 3d 185 (5th Cir. 2006).....8

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).....4

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002).....4

Stewart v. Dutra Constr., 543 U.S. 481 (2005).....4, 5, 6, 7

Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012 (7th Cir. 2006).....8

Yamaha Motor Corp., U.S.A. v. Calhoun, 515 U.S. 1186 (1995).....4

FEDERAL STATUTES

33 U.S.C. § 901-950.....7
33 U.S.C. § 905(b).....4, 6

43 U.S.C. § 1331-1356a.....7
46 U.S.C. § 30101.....6
46 U.S.C. § 30104-30106.....7
46 U.S.C. § 30501-30512.....7

RULES

SUP. CT. RULE, 37.2(a).....2
SUP. CT. RULE, 37.2(b).....2
SUP. CT. RULE, 37.6.....2

SECONDARY SOURCES

T.J. Schoenbaum, Admiralty & Maritime Law
§ 1-6 (2001).....6, 7

No. 09-1567

IN THE

Supreme Court of the United States

James D. Lee,
Petitioner,

v.

Astoria Generating Company, L.P., et al.
Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF GRANTING WRIT OF CERTIORARI

The Maritime Law Association of the United States (hereinafter "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of James D. Lee for a writ of certiorari. The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review. The MLA submits this

brief only to detail the issues that it believes warrant the attention of the Court and to argue in favor of review.[1]

Interest of *Amicus Curiae*

The MLA is a voluntary, nationwide bar association founded in 1899 and incorporated in 1993. The MLA has a membership of over 3,000 attorneys, law professors, and other distinguished members of the maritime community. The MLA is affiliated with the American Bar Association and it is represented in the ABA's House of Delegates.

The MLA's attorney members, most of whom are specialists in maritime law, represent virtually all

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that all Parties received timely notice of the intent to file this brief and the Petitioner has given written consent to the filing of this brief. However, none of the Respondents have given consent and this *amicus curiae* brief is submitted pursuant to Rule 37.2(b) as one document with the required motion for leave. Specifically, Respondents Astoria Generating Company, Orion Power New York GP, Inc., Orion Power New York, LP, Orion Power New York LP, LLC, Elliot Turbomachinery Co., and Elliot Company, have not given their consent to the MLA to file an *amicus curiae* brief.

maritime interests: ship owners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.

The MLA's purposes, as stated in its Articles of Incorporation, are:

> To advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

In an effort to promote these objectives, the MLA has sponsored legislation dealing with maritime matters and has cooperated with Congressional Committees in the formulation of legislation. The MLA also assists with international maritime

programs and initiatives alongside the United Nations, the International Maritime Organization and the Comité Maritime International. Consistent with its objective to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in numerous cases that have raised questions substantially affecting admiralty practice and jurisdiction. [2]

The MLA believes that this case presents substantial questions about the uniform application of the "vessel status" test and that this Court should grant certiorari to resolve what is a conflict amongst the Circuit Courts of Appeals and various state courts.

Summary of Argument

The New York Court of Appeals held that a floating barge containing an electricity generating turbine was a vessel under 33 U.S.C. § 905(b) of the Longshore and Harbor Workers' Compensation Act[3] ("LHWCA"). Pet. App. A at 2a. The New York Court of Appeals relied on this Court's decision in *Stewart v. Dutra Constr. Co.*,

---

[2] *E.g., Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995).

[3] Section 905(b) of the LHWCA allows certain land-based maritime workers to bring a negligence action against a "vessel".

543 U.S. 481 (2005) in determining that the floating structure was "practically capable" of maritime navigation and therefore was a vessel such that the LHWCA would apply to the Petitioner's claim. Pet. App. A 7a-8a. The *Stewart v. Dutra* "vessel status" test as applied by the New York Court of Appeals was similar to the application of that test employed by the U.S. Court of Appeals for the Eleventh Circuit and contrasts with that of the U.S. Courts of Appeals for the Fifth and Seventh Circuits.

The conflict created by these cases related to the "vessel status" test creates substantial uncertainty for maritime entities, and those who advise them, about what standards and rules apply to floating structures. Specifically, the Circuits are split on the issue of whether or not the intent of the owner of the structure is relevant to the determination of vessel status. The uncertainty created by these conflicting decisions will serve to both promote and prolong litigation of this issue. Therefore, the Court should grant certiorari to resolve the uncertainty and to promote uniformity in the application of the general maritime law.

ARGUMENT

I. THE CONFLICT OVER THE APPLICATION OF THE VESSEL STATUS TEST IN *STEWART v. DUTRA* CREATES UNDESIRABLE UNCERTAINTY FOR MARITIME ENTITIES AND THOSE WHO ADVISE THEM

The New York Court of Appeals ruled[4] that a floating power plant on which the Petitioner was injured was a vessel in navigation for purposes of section 905(b) of the LHWCA. Pet. App. A at 2a. The New York Court of Appeals' ruling confirmed a split amongst the Circuits as to the proper factors to consider in making a determination of whether a structure is a vessel under maritime statutory regimes and the general maritime law.[5]

---

[4] The MLA takes no position on the correctness or incorrectness of the opinion which Petitioner seeks this Court to review.

[5] "The definition of a 'vessel' is important in many different contexts of admiralty and maritime law. Vessel status is important in determining jurisdiction since acts that occur aboard a vessel will be presumed, absent unusual circumstances, to meet the maritime relationship requirement. Furthermore, under the Admiralty Extension Act, [46 U.S.C. § 30101], land-based damages are within the jurisdiction if 'caused by a vessel.' The existence of a vessel also may be necessary for the assertion of a salvage award, liability for unseaworthiness, or a maritime lien under the general maritime law. The applicability of several statutes,

The test applied by the New York Court of Appeals is in line with that of the Eleventh Circuit and differs from the test applied by the Fifth and Seventh Circuits.

The New York Court of Appeals' ruling relied on this Court's analysis in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005) in finding that because a floating power plant had been moved in the past to provide electricity to other locations, that the structure was "practically capable of being used as a means of transportation on water" and therefore was a vessel in navigation within the meaning of the LHWCA. Pet. App. A at 7a-8a.

The decision by the New York Court of Appeals is similar to the analysis of the Court of Appeals for the Eleventh Circuit in the case of *Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008). In *M/V Belle of Orleans*, the Eleventh Circuit relied on a floating casino's potential ability to sail on the navigable waters in its holding that the structure was a vessel for purposes of admiralty

---

such as the Jones Act, [46 U.S.C. § 30104 et seq.], the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., the Limitation of Shipowners' Liability Act, [46 U.S.C. § 30501 et seq.], and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., may depend on whether a vessel is involved." T.J. Schoenbaum, Admiralty & Maritime Law § 1-6 (2001)

jurisdiction. The Eleventh Circuit refused to consider the casino owner's intent or purpose as a relevant factor in the determination of vessel status. *M/V Belle of Orleans*, 535 F.3d at 1312. Conversely, both the Fifth and Seventh Circuit have concluded that the floating structure owner's intent as to the purpose of the structure is a highly relevant factor in the determination of vessel status under general maritime law. *Compare De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185, 187 (5th Cir. 2006) (concluding riverboat casino not a vessel due in part due to casino owners' intent to use it only as a casino) and *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (analyzing owner intent for purposes of whether a vessel can sail again) *with M/V Belle of Orleans*, 535 F.3d at 1311-12 (determining that a court should not focus on owner intent when analyzing vessel status).

The differing legal standards employed by the varied court rulings related to vessel status has produced substantial uncertainty for vessel owners and the owners of moored shore-side floating structures on the navigable waters. The split in the Circuits also creates substantial uncertainty for those who advise the various maritime interests related to shore-side and maritime activities as the interested entities now face two legal standards which could possibly govern their conduct and operations. This

disharmony in the maritime law imposes shifting standards on conduct and legal liability which encourages needless litigation until a verdict has been rendered and appealed

All of these concerns make it appropriate for the Court to grant certiorari in this case and resolve the conflict in the Circuits regarding the application of the vessel status test.

Conclusion

The MLA respectfully requests that the Court grant certiorari.

Respectfully submitted,

Charles G. De Leo
Fowler White Burnett, P.A.
Attorneys for *Amicus Curiae*
1395 Brickell Avenue
Miami, FL 33131
Telephone: (305) 789-9200
cgd@fowler-white.com